Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

POWER ENGINEERING COMPANY,
REDOUBT, LTD., and RICHARD J. LILIENTHAL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether §3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. §6928(a), allows a Court in a civil enforcement action to enter a preliminary mandatory injunction ordering that a defendant obtain financial assurances from a non-party to guarantee payment for performance of any final judgment directing a remediation of environmental contamination.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners Power Engineering Company and Redoubt, Ltd. do not have any parent companies or non-wholly owned subsidiaries.

Respondent

The United States of America.

Other Parties

Jack R. Lilienthal is named as a third-party defendant in the District Court. He was not a party to the District Court's mandatory injunctive order that is the subject of this Petition or the appeal of the District Court's Order to the United States Court of Appeals for the Tenth Circuit.

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Petitioners Power Engineering Company, Redoubt, Ltd., and Richard J. Lilienthal, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *United States v. Power Engineering Company*, 191 F.3d 1224 (10th Cir. 1999). Appendix "App." A. The opinion of the United States District Court for the District of Colorado is reported at 10 F.Supp. 2d 1145 (D.Colo. 1998). App. D. A related order entered by the District Court on August 17, 1998 is reported at 10 F.Supp. 1165 (D.Colo. 1998). App. C. A related order of the District Court entered September 24, 1998 is not published. App. B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 8, 1999. Rehearing was not requested. An extension of time for filing this petition for certiorari has not been requested.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THIS CASE

This case involves the nature and extent of remedies available under §3008(a) of the Resource Conservation and Recovery Act ("RCRA"), 28 U.S.C. §6928(a):

Section 3008. Federal Enforcement

(a) Compliance Orders. (1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subtitle where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subtitle and

> shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subtitle. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

This case involves whether ordering compliance with the requirement for financial assurances, 6 Colorado Code of Regulations (C.C.R.) 1007-3, Part 266, is a permissible remedy under RCRA §3008(a), 28 U.S.C. §6928(a). 6 C.C.R. 1007-3, §§266.10 - 266.18 are reproduced in Appendix E.

Rule 64 of the Federal Rules of Civil Procedure applies to remedies relating to the seizure of person or property for the purpose of securing satisfaction of a judgment ultimately to be entered in an action.

> *Rule 64. Seizure of Person or Property*
>
> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable;

(2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

STATEMENT OF THE CASE

Power Engineering Company is a Colorado corporation having its principal place of business in Denver, Colorado. Power Engineering Company refinishes metal crankshafts, connecting rods and rod journals for large diesel engines used in heavy equipment. Redoubt Ltd. owns the property and building used by Power Engineering Company for its operations. Richard J. Lilienthal is an officer and majority owner of both companies. Petitioners will be collectively referred to as "PEC" in this petition.

As a result of operations, soils at and around PEC's place of business and groundwater that flows beneath and away from the property have become contaminated with hexavalent chromium. As a result, the Colorado Department of Public Health and Environment ("CDPHE") issued a Compliance Order to PEC directing that PEC characterize the nature and extent of the contamination, then prepare and implement plans for remediation of contaminated soils and groundwater once the characterization was complete. PEC

has substantially completed the characterization required by the Compliance Order, and is currently involved in the remediation process.

The Environmental Protection Agency ("EPA"), through the United States, filed suit in the United States District Court for the District of Colorado on August 1, 1997.[1] Jurisdiction was vested in the District Court pursuant to §3008(a) of RCRA, 42 U.S.C. §6928(a), and 28 U.S.C. §§1331, 1345 and 1355. In its complaint, the United States alleged that PEC had and was continuing to treat, store and dispose of hazardous waste without a permit in violation of §3005(a) of RCRA, 42 U.S.C. §6925(a). The United States requested the following relief:

(a) the imposition of civil penalties pursuant to RCRA §3008(a), 42 U.S.C. §6928(a);

(b) an order enjoining defendants from future violations of Subtitle C of RCRA; and

(c) mandatory injunctive relief directing that defendants comply with Subtitle C of RCRA and close all illegal hazardous waste units.

The United States filed a Motion for a Preliminary Injunction requesting that the District Court enter mandatory

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[1]The State of Colorado filed an action on the same day seeking judicial enforcement of the Compliance Order. The State Court subsequently entered judgment against PEC for enforcement of the Compliance Order. PEC filed a motion in the District Court seeking dismissal of the United States' action based upon *Harmon Industries, Inc. v. Browner,* 19 F.Supp. 2d 988 (W.D. Mo. 1998), *aff'd.*, 191 F.3d 894 (8th Cir. 1999).

injunctive relief directing defendants to obtain financial assurances pursuant to 6 C.C.R. 1007-3, §§266.10 *et seq.* as security for payment of estimated costs necessary to remediate soil and groundwater contamination at and around PEC's property. After a three day evidentiary hearing, the United States District Court for the District of Colorado (Babcock, J.) granted the United States' motion and directed that defendants "provide financial assurance in the amount of $3,500,000 pursuant to 6 C.C.R. 1007-3, Part 266 and all applicable subparts." App. D, p.126a.

Defendants appealed the District Court's grant of the mandatory preliminary injunction to the United States Court of Appeals for the Tenth Circuit. Jurisdiction over the appeal was proper pursuant to 28 U.S.C. §1292(a). A notice of appeal was timely filed pursuant to Federal Rule of Appellate Procedure 4(a)(1). In an opinion issued September 8, 1999, the United States Court of Appeals for the Tenth Circuit affirmed the District Court. App. A, p.22a.

REASONS FOR GRANTING THE WRIT

This case presents an issue of first impression regarding the permissible scope of remedies available to the United States Environmental Protection Agency pursuant to RCRA §3008(a), 28 U.S.C. §6928(a).

A. The Order that PEC Obtain Financial Assurances Violates Longstanding Principles of Statutory Construction Established by this Court Because the District Court and Court of Appeals Provided EPA with a Prejudgment Remedy Not Authorized by Federal Rule of Civil Procedure 64 or by RCRA §3008(a).

The District Court's Order provides EPA with a prejudgment right in all cases alleging past or present unpermitted treatment, storage, and/or disposal of hazardous waste to require a defendant to provide third party financial assurances in an amount that will secure performance or payment of any order or judgment ultimately to be entered in the case. This prejudgment financial assurance remedy does not flow from a specific statutory grant conferred on EPA (or any other person) by Congress. Rather, this remedy resulted from the District Court applying regulations applicable in the context of RCRA's permit requirements as an enforcement remedy.[2]

RCRA §3008(a)(1) provides that EPA, upon notice of a RCRA violation, may pursue an order requiring that a party comply with the RCRA provision it is allegedly violating.

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[2]The financial assurance requirements are inextricably linked to the permitting regulations that incorporate parallel operational and closure requirements. The regulations governing the permit process require the submission of closure and post-closure plans and documentation demonstrating compliance with the financial assurance requirements. 6 C.C.R. 1007-3 §100.41(15) and (16). A closure plan serves as the basis from which a closure cost estimate is calculated. 6 C.C.R. 1007-3 §266.12(c). The closure cost estimate determines the amount of financial assurances required. 6 C.C.R. 1007-3 §266.14.

The District Court premised its order on findings that PEC illegally treated, stored and disposed of hazardous waste without a permit or interim status required by RCRA §3005(a), 42 U.S.C. §6925(a). App. D, p. 118a. The District Court's findings demonstrate that two alternatives were available to EPA for directing PEC to comply with RCRA §3005(a): (1) an order directing that the facility secure a permit covering such treatment, storage, or disposal, or (2) an order directing that the facility cease its illegal activities. The District Court's order directing that defendants comply with only the financial assurance requirements of 6 C.C.R. 1007-3, Part 266 did neither. Financial assurances alone do not secure PEC's compliance with the permit requirements of RCRA §3005(a), 42 U.S.C. §6925(a). Nor do financial assurances bring PEC into compliance with the operational standards of RCRA §3004(a), 42 U.S.C. §6924(a). In short, the District Court ordered relief that could not remedy the specific RCRA violations alleged by EPA and found by the District Court.

"It is an elemental canon of statutory construction that where a statute expressly provides a remedy, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19 (1979). The District Court and Court of Appeals failed to heed this elemental rule of statutory construction. Prejudgment imposition of financial assurances as security for a future order or judgment is not found within the remedies provided EPA under RCRA's enforcement provision. RCRA 3008(a)(1) provides that EPA may assess a civil penalty for any past or current violation, or order compliance with the RCRA requirements being violated, or both. These remedies are available administratively, or EPA may commence a civil action in the appropriate District Court for such relief, including relief by way of a temporary or permanent

injunction. In the absence of strong indicia of contrary congressional intent, it must be presumed that Congress provided the remedies it deemed appropriate. *Karahalios v. National Federation of Federal Employees, Local 1263,* 489 U.S. 527, 533 (1989). RCRA §3008(a)(1) does not provide for prejudgment remedies to secure performance or payment of a future order or judgment independent of Federal Rule of Civil Procedure 64.

The District Court violated other principles of statutory construction established by this Court when it read a prejudgment remedy into RCRA §3008(a), 42 U.S.C. §6928(a), that is not there. When Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies and such limitations as they may embody are not to be circumvented by extending a more generally worded statute over the subject of the more specific one. *Seminole Tribe v. Florida,* 571 U.S. 44, 74 (1996); *Middlesex County Sewage Authority v. National Sea Clammers Association,* 451 U.S. 1, 14-15 (1981). Federal Rule of Civil Procedure 64 specifically provides the remedies available to secure satisfaction of a judgment to be entered in a case. RCRA §3008(a), 42 U.S.C. §6928(a), does not. Upon finding a statutory violation, a federal court must tailor the remedy to fit the nature and extent of the violation, and give only such relief as is authorized by the applicable statute. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977). The remedy ordered by the District Court is simply not cognizable under RCRA §3008(a).

The breadth and scope of a remedy requiring that a defendant obtain financial assurances as prejudgment security in a RCRA enforcement action far exceeds the scope of any prejudgment remedy available under Rule 64. Federal Rule of Civil Procedure 64 specifies that remedies for prejudgment

security are available under the law of the state in which the District Court is held, or to the extent any existing statute of the United States governs. Colorado law limits remedies for prejudgment security to attachments before judgment, Colorado Rule of Civil Procedure 102(a), or garnishment in aid of attachment, Colorado Rule of Civil Procedure 103, §5. Prejudgment remedies available to the United States are limited under the Federal Debt Collection Act, 28 U.S.C. §§3001 *et seq.*, to attachment, receivership, garnishment and sequestration. 28 U.S.C. §§3101-3105. In contrast, the financial assurance regulations of 6 C.C.R. 1007-3, §266.14 require that a defendant obtain the agreement of a non-party requiring that non-party to pay closure and post-closure costs through a trust, letter of credit, surety bond, insurance policy or other financial instrument issued by a third party financial institution.[3] Financial assurances as a prejudgment remedy transcend the traditional prejudgment remedies because compliance requires a third party, who is not subject to the Court's jurisdiction, to provide the financial assurances on behalf of a defendant. No such third party guarantee is authorized by Federal Rule of Civil Procedure 64.

B. The District Court's Preliminary Injunction for Financial Assurances is an Order for Prejudgment Security Relating to Costs Associated With Preclosure Remediation of the Property.

The Court of Appeals did not address the significant question of whether ordering that PEC obtain financial assurances to secure compliance with a future order of the

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[3]It is undisputed that Petitioners do not meet the financial test and corporate guarantee requirement of 6 C.C.R. 1007-3, §266.14(i).

District Court exceeded the powers granted to EPA under RCRA §3008(a). The overall context of the District Court's order demonstrates that the remedy granted EPA was prejudgment security for the satisfaction of any judgment that may be ultimately entered in the action. In its order, the District Court found that the irreparable harm consisted of "the threat that the public will have to [financially] subsidize remediation and proper closure of the facility." App. D, p. 135a. The District Court's finding was based on evidence of PEC's limited financial resources, failure to pay a civil penalty assessed by CDPHE, engaging in transactions evidencing a pattern of debt reduction and asset forfeiture, and statements regarding bankruptcy and abandonment of the facility.[4] App. D, p.122a. In short, the irreparable harm found by the District Court consisted of the possibility that PEC would be unable to satisfy the judgment or comply with a future order directing remediation of the property.

This "irreparable harm", the evasion of a future court order, is the very type of harm that prejudgment remedies are intended to address. A court must exactly determine the substance of the relief sought in a proceeding because the name given to the process is not determinative. *DeBeers Consolidated Mines, Ltd. v. United States,* 325 U.S. 212, 219 (1945). The District Court failed to follow this rule when it granted a prejudgment remedy securing PEC's

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[4]At present, PEC has substantially completed all of the characterization work required by CDPHE's Compliance Order, has implemented measures for remediation of chromium contaminated groundwater flowing away from the property and is working with CDPHE on identifying viable remediation methods for chromium contaminated soils.

compliance with a future order or judgment under the guise of a preliminary injunction.

The Court of Appeals erred when it did not interpret the District Court's preliminary injunction as ordering prejudgment security securing compliance with a future judgment or order directing remediation of contaminated soils and groundwater. App. A, 19a. While the Court of Appeals acknowledged that the basis of the District Court's mandatory injunction was the threat that PEC could not or would not comply with a future District Court Order directing remediation of the property based upon financial considerations, it ignored the legal significance of that finding. The threat of irreparable harm created by the perceived inability of a defendant to satisfy a future order or judgment is the very harm Rule 64 is intended to remedy. The Court of Appeals affirmance of the District Court was based on the erroneous legal conclusion that the irreparable harm sought to be avoided was something other than the threat that PEC would be unable to satisfy a future District Court judgment or order. It was only by ignoring the basis for the District Court's finding of irreparable harm that the Court of Appeals could avoid the issue presented by this petition.

CONCLUSION

The petition for writ of certiorari should be granted. The legally sanctioned imposition of financial assurances as a prejudgment remedy to secure satisfaction of a future judgment far exceeds the scope of permissible remedies under RCRA §3008(a). This judicial expansion of the remedies available under RCRA §3008(a), under the guise of preliminary injunctive relief, cannot exist side-by-side with the principles of statutory construction established by this

Court. Supreme Court guidance is critical to prevent the wholesale substitution of preliminary injunctive relief ordering financial assurances in place of the standards applicable to prejudgment remedies governed by Federal Rule of Civil Procedure 64.

Respectfully submitted,

/s/_____

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed September 8, 1999]

No. 98-1273

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

POWER ENGINEERING COMPANY; REDOUBT, LTD.; and RICHARD J. LILIENTHAL,
Defendants-Third-Party Plaintiffs-Appellants,

v.

JACK LILIENTHAL,
Third-Party-Defendant.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 97-B-1654)

John F. McBride (John J. Zodrow with him on the briefs), Zodrow et al. P.C., Denver, Colorado, for Defendants-Appellants.

Greer Goldman, Department of Justice, Washington, D.C. (Lois J. Schiffer, Assistant Attorney General, Henry L. Solano, United States Attorney, Stephen D. Taylor, Assistant United States Attorney, Denver, Colorado; John A. Bryson, John N. Moscato, Lisa E. Jones, Attorneys, Department of Justice, Washington. D.C.; and Thomas Sitz, General Counsel for Office of Enforcement, Compliance and Environmental Justice, Environmental Protection Agency, Denver, Colorado, with him on the briefs), for Plaintiff-Appellee.

Before EBEL, MAGILL***** and LUCERO, Circuit Judges.

EBEL, Circuit Judge.

Plaintiff-Appellee United States, acting on behalf of the Environmental Protection Agency ("EPA"), sought a mandatory preliminary' injunction directing Defendant-Appellants Power Engineering Company ("PEC"), Redoubt, Ltd., and Richard J. Lilienthal (collectively, "Defendants"), to comply with the financial assurance regulations adopted by the Colorado Department of Public Health and Environment ("CDPHE") under authority delegated to Colorado by the EPA pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA") The district court granted the

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***** Honorable Frank Magill, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

mandatory preliminary injunction, requiring Defendants to provide financial assurances in the amount of $3,500,000 to ensure remediation of ground and water contamination caused by chromium and other by-products of PEC's metal refinishing business. Defendants appeal the grant of the preliminary injunction. We affirm.

I. BACKGROUND[1]

Statutory and Regulatory Background

In 1976, Congress enacted RCRA, a comprehensive statutory scheme providing cradle-to-grave oversight of solid and hazardous waste. See 42 U.S.C. § 6902; United States v. Colorado, 990 F.2d 1565, 1570 (10th Cir. 1993); United States v. Power Engineering Co., 10 F. Supp.2d 1145, 1147 (D. Colo. 1998) ("PEC"). RCRA's Subtitle C, 42 U.S.C. §§ 6921-39, governs the generation, transportation, storage, disposal, and treatment of hazardous wastes to minimize present and future threats to human health and the environment. See 42 U.S.C. § 6924(a); United Technologies Corp. v. EPA, 821 F.2d 714, 716 (D.C. Cir. 1987). To that end, section 3004 of RCRA, 42 U.S.C. § 6924, directs the EPA to promulgate regulations establishing standards for owners and operators of hazardous waste facilities, such as standards for "financial responsibility (including financial responsibility for corrective action) as may be necessary or

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[1] A more detailed background of RCRA and the facts can be found in the district court's memorandum order and opinion, United States v. Power Engineering Co., 10 F. Supp.2d 1145 (D. Colo. 1998).

desirable." 42 U.S.C. § 6924(a)(6). Section 3004 also permits the EPA to promulgate regulations establishing standards for compliance with section 3005 of RCRA. See 42 U.S.C. § 6924(a)(7). Section 3005 of RCRA, 42 U.S.C. § 6925, prohibits any person from treating, storing, or disposing of hazardous waste or constructing any hazardous waste facility for such treatment, storage, or disposal without (1) a permit issued pursuant to Section 3005; or (2) designation of "interim status," obtained by notifying the EPA of the person's hazardous waste activities and submitting an application for a permit. 42 U.S.C. § 6925(a) & (e).

If authorized by the EPA, a state may "carry out [its own hazardous waste] program in lieu of the Federal program" under Subtitle C and "issue and enforce permits for the storage, treatment, or disposal of hazardous waste." 42 U.S.C. § 6926(b); see Colorado, 990 F.2d at 1569. Action taken by a state pursuant to its federally authorized program has "the same force and effect as action taken by the [EPA]." 42 U.S.C. § 6926(d); see Colorado, 990 F.2d at 1569.

Pursuant to EPA authorization, Colorado implemented its own hazardous waste program, and promulgated regulations governing generators of hazardous waste and the operation and maintenance of hazardous waste treatment, storage, and disposal facilities. See generally, 6 Colo. Code Regs. 1007-3 ("C.C.R.") §§ 262, 264-68; Colorado, 990 F.2d at 1571; PEC, 10 F. Supp.2d at 1148. Colorado's regulations are substantially identical to the EPA's regulations, such that analysis of the federal scheme can "overlay[] and define[] that of Colorado." See Sierra Club v. United States Dept. of Energy, 734 F. Supp. 946, 947 (D. Colo. 1990). Among the state's regulations are the so-called

financial assurance requirements, located in C.C.R. § 266, which require owners and operators of all hazardous waste facilities to document that they have secured the financial resources required for closure and, if necessary, post-closure of their facilities in an appropriate and safe manner, and to pay third-party claims that may arise from their operations. See C.C.R. §§ 266.14 & 266.16; PEC, 10 F. Supp.2d at 1146.[2] The specifics of Colorado's regulatory scheme will be discussed further in the relevant context.

For present purposes, however, it is useful to identify two propositions which the district court stated, and which neither party challenges on appeal. First, according to the district court, the EPA "retains the right to bring enforcement actions compelling compliance with Colorado's hazardous waste regulations." PEC, 10 F. Supp.2d at 1148 (citing 42 U.S.C. §§ 6928, 6934, & 6973; 49 Fed. Reg. 41036 (1984); 51 Fed. Reg. 37729 (1986); 54 Fed. Reg. 20847 (1989); 56

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[2] According to the C.C.R. § 265.111,

> The owner or operator [of a hazardous waste facility] must close the facility in a manner that:
>
> (a) Minimizes the need for further maintenance, and
>
> (b) Controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated runoff, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere . . . .

Fed. Reg. 21601 (1991); 59 Fed. Reg. 16568 (1994)).[3] Second, even though the state resolved its enforcement

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[3] 42 U.S.C. § 6928 provides that the EPA may issue an order assessing a civil penalty, bring suit in federal court "for appropriate relief, including a temporary or permanent injunction," or both, when it determines that a violation of"any requirement" of Subtitle C has occurred. Id. at § 6928(a)(1). It further provides that when a violation of Subtitle C occurs in a state which is authorized to carry out a hazardous waste program, the EPA shall give notice to the state prior to issuing an order or commencing an action. See id. at § 6928(a)(2).

42 U.S.C. § 6934 provides that the EPA may order an owner or operator of a hazardous waste facility to conduct monitoring, testing, analysis, and reporting under certain conditions. See id. at § 6934(a).

42 U.S.C. § 6973 provides that the EPA may bring suit against a person who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste that presents an imminent and substantial endangerment to health or the environment. See id. at § 6973(a).

The Federal Registers cited contain the EPA's approval of Colorado's hazardous waste program or revisions thereto. In them, the EPA states that "Colorado also has primary enforcement responsibility, although EPA retains the right to conduct inspections under Section 3007 of RCRA and to take enforcement actions" under 42 U.S.C. §5 6928, 6934, & 6973. 49 Fed. Reg. 41036, 41037 (1984); see 51 Fed. Reg. 37729, 37730 (1986); 54 Fed. Reg. 20847, 20848 (1989); 56 Fed. Reg. 21601, 21602 (1991); 59 Fed. Reg. 16568, 16569 (1994).

proceedings against Defendants in this case through an administrative order, the district court assumed the EPA had "overfile" power under RCRA to bring its own subsequent enforcement action. See PEC, 10 F. Supp.2d at 1146; see also Bryan S. Miller, Harmonizing RCRA's Enforcement Provisions: RCRA Overfiling in Light of Harmon Industries v.
Browner, 5 Envtl. Law. 585,586 (1999) ("Overfiling occurs when EPA initiates an enforcement action after a state begins an action on the same matter.").

On appeal, the parties focus their argument only on whether the EPA may enforce the financial assurance provisions of the state regulations independently of compelling compliance with the entire permitting scheme. Therefore, because the propositions set forth above are not in dispute in this appeal, we assume without deciding for purposes of this appeal (1) that the EPA may enforce the state's hazardous waste regulations, see United States v. Marine Shale Processors, 81 F.3d 1361, 1367 (5th Cir. 1996) ("42 U.S.C. § 6928(a) gave EPA the power to enforce the substance of an approved state's program against private parties in that state."); and (2) that the EPA may do so even after the state has taken its own enforcement actions, but see Harmon Indus., Inc. v. Browner, 19 F. Supp.2d 988, 994, 996 (W.D. Mo. 1998) (recognizing that EPA could withdraw state authority or enforce a violation of RCRA "when the state remains inactive, after giving notice" pursuant to 42 U.S.C. § 6928(a)(2), but holding that EPA may not overfile under RCRA after state concludes enforcement action on same matter); see also Miller, supra, at 593 ("Harmon Industries, Inc. v. Browner is the first federal court decision that directly

addresses the issue of whether EPA may overfile under RCRA after a state concludes an enforcement action.").[4]

Parties

The United States is the plaintiff acting on behalf of the EPA. PEC is a Colorado corporation located in Denver. From approximately 1968, PEC has operated a business of refinishing metal crankshafts, connecting rods, and rod journals for large diesel engines used in heavy equipment. Redoubt owns the land and buildings leased to PEC, and thus is the owner of PEC's facility under Colorado regulations. Lilienthal is the president of PEC and owns 51% of the outstanding stock of both PEC and Redoubt. For purposes of the preliminary injunction motion, Lilienthal agreed that he is an "owner" and "operator" of PEC and as such subject to any order entered by the district court directing Defendants to secure financial assurances.

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[4] Unlike Harmon, Marine Shale did not arise in an overfile context. That is, while the EPA attempted to override a state enforcement action in Harmon, the EPA proceeded in Marine Shale in the absence of any clear state enforcement proceedings. Thus, while Marine Shale spoke to whether the EPA can enforce state regulations promulgated pursuant to RCRA, it did not address the issue of whether the EPA can do so once a state has initiated its own enforcement action. Harmon, on the other hand, spoke to whether the EPA can overfile extant state enforcement proceedings, but Harmon does not address whether the EPA may enforce state implementing regulations in the absence of any state enforcement effort. In fact, the EPA brought its complaint in Harmon under federal regulations. See Harmon, 19 F. Supp.2d at 992 n.4.

Nature of the Case

PEC's refurbishing operations produce more than 1,000 kilograms of hazardous waste per month, and the facility stores more than 6,000 kilograms per month. The facility generates approximately thirteen different waste streams, including arsenic, lead, mercury, and hexavalent chromium contaminated media. In 1992, Denver Health and Hospitals ("DHH") contacted the CDPHE concerning a discharge into the Platte River of high levels of hexavalent chromium. After investigation, DHH determined that PEC was the likely sources of the discharge. The CDPHE then conducted compliance review inspections at PEC in August and September of 1992, and reported numerous violations of federal and state regulations governing the treatment, storage, and disposal of hazardous waste, which the district court set out at length. In addition, PEC never applied for a permit or obtained interim status.

Although PEC notified the CDPHE in 1986 that it was a generator of certain hazardous waste, PEC failed to assess adequately its generation, treatment, storage, and disposal of hazardous waste, and the CDPHE did not know the severity and extent of PEC's noncompliance with the state hazardous waste program until the August 1992 inspection. As a result of PEC's illegal storage and disposal of hazardous waste, groundwater at and under the facility, as well as groundwater under areas outside the facility, is contaminated with levels of hexavalent chromium greatly exceeding established toxicity

levels.[5] A plume of chrome contamination extends from the facility approximately 3,310 feet into the South Platte Valley Fill Aquifer, which is connected to the South Platte River.

After inspecting PEC's facility again in 1993 and 1994, the CDPHE issued an Initial Compliance Order on June 28, 1994. That order was stayed at PEC's request, while PEC and the CDPHE held conferences between 1994 and 1996. The CDPHE then issued a Final Administrative Compliance Order on June 13, 1996 ("Order"). While complying with certain requirements of the Order, PEC failed to meet others. Accordingly, on December 26, 1996, the CDPHE issued an Administrative Penalty Order assessing civil penalties of approximately $1,875,000. Defendants did not appeal the penalty, but neither have they paid any portion of it.

The EPA was displeased with the manner in which the CDPHE sought to enforce the RCRA regulations. At the EPA's request, the United States exercised its authority to seek Defendant's compliance with the state regulations. As part of its suit, the United States sought a mandatory preliminary injunction directing Defendants to comply with the regulations for financial assurances. After a hearing, the district court granted the preliminary injunction pursuant to §3008(a) of RCRA, 42 U.S.C. §6928(a), and Fed. R. Civ. P. 65. Defendants now appeal.

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[5] The district court noted that PEC currently is managing hazardous wastes in compliance with applicable storage regulations. See PEC, 10 F. Supp.2d at 1151.

II. DISCUSSION

Standard of Review

We review the grant of a preliminary injunction for abuse of discretion. See Elam Constr., Inc. v. Regional Trans. Dist., 129 F.3d 1343, 1346 (10th Cir. 1997), cert. denied, 118 S. Ct. 1363 (1998). Granting a preliminary injunction is proper where the moving party shows: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) the threatened harm outweighs injury, which the injunction may cause the opposing party; and (4) the injunction will not be adverse to the public interest. See Kansas Health Care Assoc., Inc. v. Kansas Dep't of Soc. & Rehab. Servs., 31 F.3d 1536, 1542 (10th Cir. 1994). A mandatory preliminary injunction (i.e., one that directs a party to act) imposes "an even heavier burden on [the movant] of showing that the four factors listed above weigh heavily and compellingly in movant's favor." Id. at 1543. We review the underlying issues of law decided by the district court de novo. See Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1357 (10th Cir. 1990); Tefel v. Reno, No. 98-4616, 1999 WL 496227, at *8 (11th Cir. July 14, 1999).

The district court found all four factors supporting a preliminary injunction. See PEC, 10 F. Supp.2d at 1162-65. As the government notes, Defendants on appeal do not appear to challenge the finding of the latter three factors. Rather, Defendants challenge the applicability of RCRA and state implementing regulations, an attack that goes to the government's likelihood of success on the merits. Additionally, Defendants raise questions about the

appropriateness of a preliminary injunction ordering financial assurances. We address Defendant's arguments in turn.

A.

Defendants challenge the district court's holding that PEC currently disposes of hazardous waste, an activity which would subject it to Colorado's regulations for facilities treating, storing, or disposing of hazardous waste ("TSD facilities"). We agree with the district court.

Colorado regulations define a TSD facility as "a location at which hazardous waste is subjected to treatment, storage, or disposal and may include a facility where hazardous waste is generated." C.C.R. § 260.10. Under the regulations, "[a] generator [of hazardous waste] who treats, stores, or disposes of hazardous waste on-site must comply with the applicable standards and permit requirements set forth in Parts 264, 265, 266, and Part 100 of these regulations." C.C.R. § 262.10 n.2.[6] C.C.R. § 266 further provides that its financial assurance requirements "apply to

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[6] C.C.R. § 264 sets out the standards for owners and operators of hazardous waste treatment, storage, and disposal facilities with permits. C.C.R. § 265 sets out interim status standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities who have obtained interim status as well as those who have failed to do so. See C.C.R. § 265.1(b); United States v. Ekco Housewares, Inc., 62 F.3d 806, 809 (6th Cir. 1995); PEC, 10 F. Supp.2d at 1150. C.C.R. § 266 sets out financial assurance requirements. C.C.R. § 100 sets out the regulations for permit applications.

owners and operators of all hazardous waste facilities." C.C.R. § 266.10(a). RCRA and the state regulations define "disposal" as

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3); C.C.R. § 260.10.

For substantially the same reasons discussed thoroughly in the district court's opinion, we find that Defendants currently are disposing of hazardous wastes illegally in three ways:

> (1) the Facility's air scrubbers dispose a mist of hexavalent chromium onto Facility soil; (2) the Facility failed to remediate the soil contaminated by a yellow/orange liquid that leaked from air scrubbers down the west side of the Facility's main building; and (3) the Facility failed to remediate the three open waste piles of contaminated soil excavated from beneath the chrome-plating tanks and the remaining contaminated soil located beneath the chrome-plating tanks.

PEC, 10 F. Supp.2d at 1157, 1157-60.

Furthermore, we conclude that PEC is subject to Colorado's financial assurance requirements. By stipulation before the district court for purposes of the preliminary injunction motion, the parties agreed that PEC "is and was a 'generator'" of hazardous waste as defined by RCRA and Colorado regulations. Thus, PEC "must comply with the applicable standards and permit requirements" of the Colorado regulations for generators of hazardous waste who are TSD facilities, including the financial assurance requirements of § 266. C.C.R. § 262.10 n.2. Additionally, those financial assurance requirements "apply to" Redoubt and Lilienthal as "owners and operators of [al hazardous waste facilit[y]." C.C.R. § 266.10(a).

We do not find Defendants' argument to the contrary persuasive. Defendants contend that, even if they are disposers of hazardous waste, they are not a disposal facility and therefore not a TSD facility. Defendants rely on C.C.R. § 260.10, which defines a "disposal facility" as a facility "at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure." Defendants argue that because they intend "to remedy the contamination of the site while PEC is still a going concern," no waste will remain after closure, thereby precluding them from being a disposal facility by definition.

We find no merit to this argument. Defendants essentially contend that any generator currently disposing of hazardous waste on their facility does not have to comply with regulations for TSD facilities so long as they intend to clean up the waste before closure. There is no basis in the provision cited for such a sweeping subjective loophole. As an initial matter, the intent element in the definition of "disposal

facility" pertains to whether hazardous waste was "intentionally placed" on land or water, not whether the polluter intends the hazardous waste to remain. Cf. United States v. Allegan Metal Finishing Co., 696 F. Supp. 275, 287 (W.D. Mich. 1988) (refusing to read into 42 U.S.C. § 6925(e), interim status provision for "land disposal facility," "a state of mind requirement," based on the regulatory definition of "disposal facility," as to "whether the defendant intended the waste to remain [after closure]" (quotations omitted)). As the EPA has indicated, the purpose of the intent element in the definition of "disposal facility" is "to indicate the [EPA's] intent that the term does not apply to activities involving truly accidental discharge of hazardous waste," because the EPA posits that "permits logically can only be required for intentional disposal of hazardous waste." 45 Fed. Reg. 33066, 33068 (1980).

Moreover, we need not decide whether PEC is a "disposal facility." Unlike "disposal facility," the definition of "disposal" does not limit its reference only to those facilities at which hazardous waste will remain after closure. Rather, as noted, "disposal" encompasses "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters." C.C.R. § 260.10. As a generator of hazardous waste that engages in its disposal, PEC is a TSD facility. See C.C.R. § 260.10. Furthermore, as a TSD facility, PEC must comply with the requirements of C.C.R. §§ 264, 265, 266, and 100; and as PEC's owner and operator, Redoubt and Lilienthal must meet the financial assurance requirements of C.C.R. § 266. See C.C.R. § 260.10 (defining

TSD facility to include generators of hazardous waste "at which hazardous waste is subjected to treatment, storage, or disposal"); C.C.R. § 262.10 n.2 (generator disposing of hazardous waste is subject to C.C.R. §§ 264-66 & 100); C.C.R. § 266.10(a) (financial assurance provisions of C.C.R. § 266 apply to owners and operators of all hazardous waste facilities). The definition of "disposal facility" on its face does not negate these regulatory mandates, and Defendants' argument does not convince us otherwise.

B.

Defendants argue that "financial assurances are part and parcel of an integrated regulatory scheme governing pre-operational permitting of a TSD[facility] which cannot be severed and applied separately from the balance of the regulatory scheme." Since the amount of financial assurances depends on the cost estimates of closure and post-closure of the TSD facility, and since closure and post-closure plans are required for a person to obtain a permit, Defendants argue that the financial assurance requirements come into play only at the tail end of the regulatory, scheme for permitting. Thus, Defendants assert that the district court at most could only require Defendants to (1) secure a permit covering treatment, storage, or disposal of hazardous waste; or (2) cease its illegal activities. Defendants conclude that the district court therefore erred in enjoining compliance with the financial assurance provisions.

We find Defendants' argument unsupportable. As an initial matter, § 3008 of RCRA, 42 U.S.C. § 6928, authorizes the EPA to commence an action "for appropriate relief, including a temporary or permanent injunction," for "any

requirement" of Subtitle C, and to do so in states that have authorized hazardous waste programs as long as the EPA gives prior notice to the state. See 42 U.S.C. § 6928(a)(1)-(2). As noted, the district court stated, and neither party challenges, that the EPA may bring an overfile action under RCRA to enforce state implementing regulations. Thus, we turn to whether the EPA may require Defendants to comply only with Colorado's financial assurance requirements independent of requiring compliance with the entire permitting scheme.

Colorado's financial assurance requirements "apply to owners and operators of all hazardous waste facilities," and inter alia require "[a]n owner or operator of each facility . . . [to] establish financial assurances for closure, and if applicable, post-closure of the facility." C.C.R. §§ 266.10(a) & 266.14 (emphasis added). By their terms, these regulations apply to all owners and operators of hazardous waste facilities; they are not limited to permit holders or applicants. In light of these clear provisions, we do not believe that the mere fact that the permit application requires a showing of compliance with the financial assurance provisions somehow renders these provisions applicable only in the context of permittine. See C.C.R. § 100.41. Based on the plain language of the Colorado financial assurance requirements, we conclude that the EPA's power to enforce Colorado's regulations includes the power to enforce the financial assurance requirements independent of requiring a permit. See United States v. Ekco Housewares, Inc., 62 F.2d 806, 809, 812 (6th Cir. 1995) (finding defendant subject to EPA regulations for financial assurance until final closure is certified even though defendant never obtained interim status by applying for permit).

Defendants' remaining arguments on this issue do not dissuade us from our conclusion. Defendants attempt to buttress their position by arguing that the CDPHE shares their view that the financial assurance requirements cannot be enforced separately from the entire permitting scheme. As support, Defendants state that the "CDPHE has never required a generator of hazardous waste, such as PEC, who is illegally treating, storing or disposing of hazardous waste to provide financial assurances." In a related point, Defendants contend that the CDPHE has only considered PEC to be a generator of hazardous waste, and has never considered it also to be a TSD facility "subject to the permit regulations, including the financial assurance requirements."

The record belies Defendants' argument, because PEC's own environmental manager testified that the CDPHE told PEC that it was a storage and disposal facility that needed to obtain a permit pursuant to state regulations. Additionally, while the CDPHE did not choose to require Defendants to comply with the financial assurance requirements in its Final Compliance Order, it believed it "[had] that option."

Rejecting Defendants' arguments, we hold that the EPA can enforce the state financial assurance requirements independent of requiring compliance with permitting.

C.

Defendants assert that the district court's grant of a preliminary injunction directing them to provide financial assurances in the amount of $3,500,000 was "not directed towards requiring Defendants to obtain financial assurances for the operation of a TSD[facility], but was a thinly

disguised attempt to obtain prejudgment security to enforce any future judgment of the District Court." In particular, Defendants assert that the preliminary injunction was "for costs associated with remediation of existing contamination, not for remediation of any contamination that may exist if and when PEC closes its business." Defendants argue that the preliminary injunction was actually prejudgment security, and therefore it should be governed by Fed. R. Civ. P. 64. Defendants conclude that the preliminary injunction exceeds the scope of Rule 64 because "the prejudgment remedies available to the United States [under Rule 64] are limited to attachment, receivership, garnishment and sequestration." Additionally, Defendants contend that the district court erred in granting the preliminary injunction because "RCRA does not have a provision providing prejudgment remedies to secure a future judgment in an enforcement action under § 3008."[7]

We reject Defendants' arguments at the outset, because we do not interpret the district court's preliminary injunction for financial assurances to be an order for prejudgment security for pre-closure remediation. We recognize that the district court ordered financial assurances based upon the costs of remediating the present contamination around the PEC facility. However, we believe the district court associated these remediation costs with closure and post-closure of the facility. First, as a legal matter, the district

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[7] The United States contends that Defendants did not properly raise this objection before the district court. We have examined the record and conclude that Defendants sufficiently raised the issue below.

court directed Defendants "to provide financial assurances in accordance with 6 COLO. CODE REGS. 1007-3 § 266." See PEC, 10 F. Supp.2d at 1165. That the court ordered financial assurances "in accordance with" C.C.R. § 266 indicates that the requested assurances will be used for closure and post-closure costs. Second, as a factual matter, the district court appeared to assume that closure and post-closure costs for the facility would include costs for remediating the site in its current condition because Defendants have (1) violated hazardous waste regulations for decades; (2) failed to comply with the Final Compliance Order of the CDPHE respecting remediation of its open piles of hazardous waste; (3) failed to pay the civil penalty assessed by the CDPHE; (4) recently engaged in a pattern of debt reduction and asset forfeiture; and (5) threatened bankruptcy or abandonment of the facility if the federal or state government continues seeking the facility's compliance with applicable hazardous waste regulations. See PEC, 10 F. Supp.2d at 1157, 1163, 1165. Therefore, given Defendants' history of unwillingness to comply with RCRA and state implementing regulations, we believe that the district court properly considered remediation costs for the present contamination in calculating costs associated with financial assurances necessary, for the facility's closure or post-closure. Accordingly, we hold that the district court properly ordered financial assurances for closure and post-closure of the facility.

D.

Finally, Defendants contend that the district court's calculation of the $3,500,000 figure for financial assurances was based on "nothing more than gross and speculative approximation." Because Defendants never have complied

with applicable RCRA regulations by providing closure and post-closure plans, Defendants contend that the absence of those plans "is fatal to the United States' request for financial assurances," as such financial assurances "cannot be calculated without the detailed closure cost estimates required by the regulations."

We disagree with Defendants' argument. Even though PEC does not have closure and post-closure plans pursuant to C.C.R. § 265, the district court properly based its estimate of financial assurances on the costs of remediating present contamination at the site, under the assumption that the contamination will remain at closure. See supra Part II.C. Furthermore, the district court based its figure on estimates from the CDPHE and PEC itself. The CDPHE estimated the cost to remediate the contaminated soil and groundwater at between $3,000,000 and $6,000,000. PEC's counsel estimated that remediation of the site for contaminated soil would cost $2,300,000, and PEC's hydrologist estimated that remediation of the groundwater would cost $1,200,000. From these figures, the district court concluded that the government's request for financial assurances in the amount $3,500,000 was a "fair estimate of the costs of remediation," and ordered financial assurances in that amount. PEC, 10 F. Supp.2d at 1154.

We believe the district court's figure was supported by the evidence, given that the amount of financial assurances equaled the sum of PEC's own remediation estimates ($2,300,000 for site remediation and $1,200,000 for groundwater remediation), and was within the remediation estimated provided by the CDPHE ($3,000,000 to $6,000,000). While Defendants and the government both

admit that the estimates were rough rather than exacting, Defendants in large part were responsible for the inexact nature of the estimates because of their failure to develop closure and post-closure cost estimates pursuant to state regulations. The district court did its best to estimate fairly closure costs under non-ideal circumstances of Defendants' creation, and we find the evidence supported the estimate.

CONCLUSION

The district court did not abuse its discretion in issuing the mandatory preliminary injunction ordering Defendants to provide financial assurances in the amount of $3,500,000 pursuant to C.C.R. § 266. The district court's order is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

[Filed September 24, 1998]

Civil Action No. 97-B-1654

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	)
	)
POWER ENGINEERING COMPANY, REDOUBT, LTD., and RICHARD J. LILIENTHAL,	)
Defendants/Third Party Plaintiffs,	)
	)
v.	)
	)
JACK LILIENTHAL,	)
Third Party Defendant.	)
	)

ORDER

Defendants, Power Engineering Company ("Power Engineering"), Redoubt, Ltd. ("Redoubt"), and Richard J. Lilienthal (collectively, "defendants"), move for vacatur or

reconsideration of the Memorandum Opinion and Order entered August 17, 1998. Plaintiff, United States of America ("the United States"), acting on behalf of the Environmental Protection Agency, object to defendants motion. The motion is adequately' briefed and oral argument will not materially aid its resolution. For the reasons set forth below, I deny, in part, and grant as confessed, in part, defendants' motion for vacatur and reconsideration.

I. PROCEDURAL HISTORY

By written order entered June 10, 1998 ("the June 10 order"), I directed defendants to "provide financial assurances in the amount of $3,500.000 pursuant to 6 COLO. CODE REGS. 1007-3 § 266 and all applicable subparts." Defendants filed a show cause submission on July 10, 1998, explaining why they had not yet provided financial assurances within the time afforded by the June 10 order. Defendants appealed the June 10 order on July 22, 1998. Plaintiff filed an objection to defendants show cause submission on July 24, 1998. A hearing was held on August 6, 1998, during which the issue of this court's continuing jurisdiction was discussed but not resolved. Accordingly, I directed the parties to brief the jurisdictional issue.

On August 7, 1998, the very next day, the United States moved to vacate the briefing schedule and also moved for the issuance of an order imposing specific financial assurance requirements on defendants. In its motion, the United States argued that this court had jurisdiction to enforce the June 10 order despite defendants' appeal of that order. On August 17, 1998, ten days later. I entered a Memorandum Opinion and Order ("the August 17 order") vacating the

briefing schedule and directing defendants to provide financial assurances in the amount of $3,500.000 in the form of a surety bond guaranteeing payment into a closure and/or post-closure trust fund pursuant to 6 COLO. CODE REGS. 1007-3 § 266.14(f). Defendants did not respond to the United States' August 7 motion before the August 17 order entered.

On August 31, 1998, defendants moved for vacatur or reconsideration of the August 17 order. They argued, *inter alia,* that vacatur of the briefing schedule and their inability to file a response to the United States' August 7 motion deprived them of due process of law guaranteed by the Fifth Amendment of the United States Constitution. Out of an abundance of caution. I entered an order on September 1, 1998, which order: (1) afforded defendants the opportunity to file a response to the United States' August 7 motion: (2) held in abeyance defendants' August 31 motion for vacatur or reconsideration: and (3) stayed the August 17 order until further order. Defendants filed their response to the United States' August 7 motion on September 10, 1998 and the United States filed a reply on September 17, 1998. The issues of jurisdiction and vacatur are now fully briefed. I remove the stay of the August 17 order, subject to the modification set forth below. An extensive procedural history of this case appears in the August 17 order.

II. ANALYSIS OF DEFENDANTS' MOTION FOR VACATUR AND RECONSIDERATION

Defendants filed their response to the United States' August 7 motion on September 10, 1998. Defendants argue that, in light of their appeal of the June 10 order, this court does not have jurisdiction to impose specific financial

assurance requirements on them. Defendants also contend that they are unable to provide the specific form of financial assurance requirement sought by the United States, a surety bond guaranteeing payment into a closure and/or post-closure trust fund. I address each argument in turn.

a. Jurisdiction

Defendants contend that the relief sought by the United States will impermissibly modify the status quo pending appeal. For the reasons set forth with more particularly in the August 17 order. I disagree. Granting the relief requested by the United States does not materially alter the status of the case on appeal. The June 10 order from which defendants appeal directs defendants to "provide financial assurances in the amount of $3,500.000 pursuant to 6 COLO. CODE REGS. 1007-3 § 266 and all applicable subparts." The August 17 order merely requires defendants to provide financial assurances in accordance with a specific subpart of §266. Thus, the August 17 266. Thus, the August 17 order does not expand the scope of injunctive relief granted in the June 10 order. It is important to note that the status quo pending appeal derives from the June 10 order, which order requires defendants to provide financial assurances. The status quo pending appeal, therefore, is achieved by defendants providing financial assurances.

Defendants could have complied with the June 10 order by providing any type of financial assurance allowed by § 266, including a bond, trust, insurance, or any combination thereof. Defendants, however, failed to provide any type of financial assurance. Defendants' show cause submission, premised on draft trust agreements that proved to be

insufficient, did not bring defendants into compliance with the June 10 order. This court necessarily retains jurisdiction over the parties until they comply with the terms of the June 10 order even though defendants appeal from that order. *Tyler v. City of Manhattan,* 118 F.3d 1400, 1402 n. 1 (10th Cir. 1997). Accordingly, I reject defendants' jurisdiction arguments.

The August 17 order is an appropriate means to encourage compliance with the June 10 order. *See* Fed. R.Civ. P. 62(c) ("When an appeal is taken from an interlocutory or final judgment granting . . . an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security, of the rights of the adverse party."). As with all litigants that appeal an injunctive order, defendants must either comply with the injunctive order or seek a stay of the injunctive order. Stay will occur only if defendants post a supersedeas bond. *See, e.g.,* Fed. R.Civ. P. 62(a), (d). I deny, therefore, defendants' motion for vacatur or reconsideration as to the issue of jurisdiction.

b. Defendants' Ability to Post a Surety Bond

As noted above, the August 17 order requires defendants to obtain financial assurances in the form of a surety bond in the amount of $3,500.000 that complies with the provisions of 6 COLO. CODE REGS. 1007-3 § 266.14(f) ("Surety Bond Guaranteeing Payment into a Closure and/or Post Closure Trust Fund"). Defendants contend that the evidence admitted during the preliminary, injunction hearing proves they are unable to obtain a surety, bond that complies

with § 266.14(f). Although I disagree with defendants' argument, I need not address the issue because the United States, softening its stance, makes the following concession in its reply brief:

> . . . the United States is concerned that enforcement of the August 17, 1998 Memorandum Opinion and Order in its present form will only provide Defendants with a basis for further delay. Defendants allege that while they could provide a form of assurance acceptable under 6 Colo. Code Regs. 1007-3 § 266, it is impossible for Defendants to do so by providing a surety bond and standby trust.
>
> * * *
>
> Rather than facilitating further delay by insisting that the Order be enforced in its present form, the United States respectfully suggests that the August 17 Memorandum Opinion and Order be amended in part . . .

(Plf.'s Reply to Defs.' Mot. for Reconsideration at 5.) The United States then suggests that I amend the August 17 order to allow defendants to provide an alternative form of financial assurance if defendants proposed alternative satisfies all requirements of § 266 and has been agreed to by the United States. Supplementation of the August 17 order as suggested by the United States vitiates all of defendants' stated concerns except their jurisdictional argument. Accordingly, supplement the August 17 order as suggested by the United States. Thus, I grant as confessed defendants' motion for

vacatur or reconsideration as to the issue of their ability to post a surety bond.

It is important to note at this juncture that, after much time and expenditure of resources, the parties are left in a status quo that does not materially differ from the status quo immediately after entry of the June 10 order. The June 10 order required defendants to provide financial assurances in accordance with § 266. The August 17 order, as supplemented by this order, requires defendants to provide financial assurances in accordance with § 266.14(f) or, if agreed to by the United States, any subpart of § 266. Thus, we have taken two steps forward and almost two steps backward.

Accordingly, I ORDER that:

(1) defendants' motion for vacatur or reconsideration is DENIED, in part, and GRANTED as confessed, in part;

(2) the stay of the Memorandum Opinion and Order entered August 17, 1998 is LIFTED;

(3) the Memorandum Opinion and Order entered August 17, 1998, which order requires defendants to provide financial assurances in the amount of $3,500.000 in the form of a surety, bond guaranteeing payment into a closure and/or post-closure trust find pursuant to 6 COLO. CODE REGS. 1007-3 § 266.14(f), is SUPPLEMENTED as follows: defendants MAY PROVIDE an alternative

form of financial assurance if: (i) their proposed alternative satisfies all requirements of 6 COLO. CODE REGS. 1007-3 § 266: (ii) their proposed alternative has been agreed to by the United States: and (iii) the defendants provide to the United States a letter, signed by an authorized representative of defendants, indicating why it is impossible for defendants to comply with the August 17 order and/or why compliance with the August 17 order would materially disadvantage defendants relative to other available financial assurance requirements; and

(4) defendants SHALL COMPLY with the August 17 order, as supplemented by this order, within twenty days or show good cause as to why they have not achieved such compliance.

Dated: September 24, 1998 in Denver, Colorado.

BY THE COURT:

/s/_____
LEWIS T. BABCOCK, JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

[Filed August 17, 1998]

Civil Action No. 97-B-1654

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	)
	)
POWER ENGINEERING COMPANY, REDOUBT, LTD., and RICHARD J. LILIENTHAL,	)
Defendants/Third Party Plaintiffs,	)
	)
v.	)
	)
JACK LILIENTHAL,	)
Third Party Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

Babcock, J.

Plaintiff, United States of America ("the United States"), acting on behalf of the Environmental Protection Agency, moves for the issuance of an order requiring defendants, Power Engineering Company ("Power Engineering"), Redoubt, Ltd. ("Redoubt"), and Richard J. Lilienthal (collectively, "defendants"), to obtain financial assurances in the form of a surety bond that satisfies state regulations adopted by the Colorado Department of Public Health and Environment, found at 6 COLO. CODE REGS. 1007-3 § 266.14(f). The United States also moves to vacate the established briefing schedule regarding the jurisdictional issue raised at the August 6, 1998 hearing. The United States' motion is adequately briefed and oral argument will not materially aid its resolution. For the reasons set forth below, I grant the United States' motion.

I. PROCEDURAL HISTORY

The United States commenced this action on August 1, 1997, alleging eight claims: (1) treatment of hazardous waste without a permit or interim status; (2) disposal of hazardous waste without a permit or interim status; (3) shipment of hazardous waste to an un-permitted facility; (4) improper container management; (5) storage of hazardous waste without a permit or interim status; (6) failure to provide employee training; (7) failure to have a hazardous waste contingency plan; and (8) illegal operations (failure to have a groundwater monitoring program, failure to have a closure plan, failure to minimize releases of hazardous waste, and failure to obtain and provide financial assurances for closure and post-closure). The United States also alleges that Power Engineering has failed to comply with a CDPHE Administrative Compliance

Order. Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 (1997).

The United States filed a motion for preliminary injunction on January 16, 1998, requesting issuance of an order requiring defendants to comply with Colorado hazardous waste regulations. These regulations require owners and operators of all hazardous waste facilities to document that they have secured the resources required to close their facilities in an appropriate and safe manner, and to pay third-party claims that may arise from facility, operations. A preliminary injunction hearing was held beginning May 11, 1998. On June 10, 1998, I issued a Memorandum Opinion and Order ("the June 10 order") granting the United States' motion for preliminary, injunction. The June 10 order directs defendants to provide financial assurances in the amount of $3,500,000 or show cause why they have not provided such financial assurances within thirty days.

Defendants filed a "Show Cause Submission" on July 10, 1998 that states defendants were in the process of finalizing trust arrangements and that the trust would be finalized within ten business days. Three draft trust agreements were attached to defendants' Show Cause Submission. These three draft trust agreements indicated that defendants intended the following properties to constitute the res of the trust: (1) Richard Lilienthal's undivided one-half interest in real property located in Eagle County, Colorado (current estimated value of $1,200,000.00); (2) real property owned by Redoubt, Ltd. on which the Power Engineering facility operates (current estimated value $0.00; stated value in draft trust agreement of $2,000,000.00); and (3) 9,340

shares of UNUM stock owned by Power Engineering (current estimated value $520,000.00).

The United States filed a response to defendants' Show Cause Submission on July 24, 1998, objecting on four grounds. First, the United States argued that defendants' proposed trusts do not provide for joint and several liability because each trust has a separate grantor. The United States contended that one trust, rather than three separate trusts, should exist. Second, the United States argued that defendants impermissibly altered the trust agreement language required by Colorado regulations. Colorado regulations state: "Payments made to the Trustee shall consist of cash or securities acceptable to the Trustee." 6 COLO. CODS REGS. 1007-3 §§ 266.14(a) and 266.18(a)(1). The draft trust agreements impermissibly state:

> Contributions of Property. made to the Trustee for the Fund may consist of the property set forth in the District Court's Order and other property, acceptable to the Trustee.

(Ex. A to Def.'s Show Cause Submission at 2.) The United States contends that, because the June 10 order requires defendants to "provide financial assurance in the amount of $3,500,000 pursuant to 6 COLO. CODE REGS. 1007-3 § 266 and all applicable subparts," any trust must consist of cash or securities and not real property, to ensure liquidity, and prevent the diminishment of the trust res by subsequent impairment, such as tax liens. A letter from one of the bankers contacted by defendants also indicates that Norwest Bank would only establish a trust or escrow fund to hold assets "in liquid form." (Ltr. from Martinez of Norwest Bank

of 7/20/98, Ex. A to Plf.'s Resp. to Def.'s Show Cause Submission.)

Third, the United States argued that two of the three properties proposed as trust res are inadequate. The United States contended that Richard Lilienthal's undivided one-half interest in real property located in Eagle County, Colorado (current estimated value of $1,200,000), is subject to a restrictive covenant regarding conveyance and has already been quitclaimed to Richard Lilienthal's wife. Defendants disputed this contention. The United States also contended that the property owned by Redoubt on which the Power Engineering facility operates is worthless until remediated. Thus, the only proposed res acceptable to the United States is the stock owned by Power Engineering.

Fourth, the United States objected to other language of the draft trust agreements. Defendants modified the trust language, mandated by 6 COLO. CODE REGS. 1007-3 § § 266.14(a) and 266.18(a)(1), regarding payment of remediation costs out of trust assets. The proposed trust agreements give defendants more power over trust assets than envisioned by Colorado regulations. In summary., the United States objects to defendants' failure to comply with the June 10 order, attempt to fund the proposed trusts with real property, instead of cash or securities, attempt to provide real property that has an impaired value, and proposal to modify, the trust agreement in a manner that allows defendants to authorize or prohibit payments from the trust assets. The United States did not move for contempt, but averred that the question of contempt "is one for the Court to determine." (Plf.'s Resp. to Def.'s Show Cause Submission at 9.)

Defendants filed a supplement to their show cause submission on July 27, 1998. Defendants contended that Norwest Bank did not disclose its objection to acting as Trustee of a trust funded by real property until July 20, 1998. Since receipt of the letter from Norwest Bank, Defendants allege that they have contacted eleven "companies" regarding the trust arrangement "previously . . . discussed with Norwest Bank." (Def.'s Supp. at 2.)

A status conference was held on August 6, 1998 to address defendants' compliance with the June 10 order. At the commencement of the hearing, I raised the issue of whether defendants' Notice of Appeal, filed July 22, 1998, divested this court of jurisdiction to enforce the June 10 order. Neither the United States nor defendants were prepared to argue this issue. Thus, I established a briefing schedule that would have concluded on September 11, 1998.

Also during the status conference, the issues raised by defendants' Show Cause Submission and the United States' objections were addressed. I indicated that the United States' objections to the form of trusts proposed by defendants were valid. The June 10 order requires compliance with Colorado regulations and defendants' proposed trusts ignore many of important trust features mandated by these regulations, such as the type of res and powers of the grantor. I also noted that the United States' concerns regarding the property used to fund the trusts had merit. Clearly, Redoubt's land is not worth $2,000,000. The very. purpose of financial assurances is to ensure that liquid assets exist to pay for remediation if defendants ignore their remediation responsibility. Although Redoubt's contaminated land may be valuable if remediated,

the land surely does not constitute a valid financial assurance in its unremediated state.

Lastly, I noted at the August 6 status conference that the June 10 order is broadly worded. Nowhere does the June 10 order require defendants to provide financial assurances in the form of a trust funded by property discussed in that order. Rather, the June 10 order requires defendants to "provide financial assurance in the amount of $3,500,000 pursuant to 6 COLO. CODE REGS. 1007-3 § 266 and all applicable subparts." (Ord. of 6/10/98 at 46.) While I necessarily discussed defendants' personal and real property in the June 10 order, I did so only in assessing whether defendants had the ability to provide financial assurances. The order merely states:

> [Power Engineering's] readily available cash of $800,000, when combined with Lilienthal's directly owned assets of $1,400,000, could be placed in a trust fund with a present value of $2,200,000. Defendants could borrow the remaining $1,300,000, obtaining an insurance policy for that fixed amount.

(Ord. of 6/10/98 at 25-26 (emphasis added)). I found that the evidence presented at the injunction hearing illustrated defendants' ability to provide financial assurances, but the June 10 order neither requires nor precludes defendants from funding a trust or other form of financial assurance with the property discussed in that order. Thus, defendants could have complied with the mandatory injunction by providing financial assurance comprised of insurance, bonds, trusts, or any combination thereof.

On August 7, 1998, one day after the status conference and outside the established briefing schedule, the United States filed a "Motion to Vacate the Briefing Schedule and Impose Financial Assurance Requirements." In its motion, the United States addresses the jurisdictional issue at length and concludes that this court has continuing jurisdiction to enforce the June 10 order notwithstanding defendant's notice of appeal. In light of defendants' insufficient trust proposal, the United States also moves for issuance of an order requiring defendants to obtain financial assurances in the form of a bond that complies with 6 COLO. CODE REGS. 1007-3 § 266.14(f) (Surety Bond Guaranteeing Payment into a Closure and/or Post Closure Trust Fund). As of today's date, defendants have not filed a response to the United States' August 7, 1998 motion.

II. CONTINUING JURISDICTION

Generally, a party's filing of a notice of appeal divests the district court of jurisdiction. *Stewart v. Donges*, 915 F.2d 572, 574-576 (10th Cir. 1990) (citations omitted). "[T]he filing of a notice of appeal, whether from a true final judgment or from a decision within the collateral Order exception, 'is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Stewart*, 915 F.2d at 575 (quoting *Griggs v. Provident Consumer Discount* Co., 459 U.S. 56, 58 (1982)). The principle of jurisdictional transfer is not, however, absolute. No transfer occurs if the appeal is taken from a non-appealable order, *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1148 (10th Cir. 1991), or if the district court certifies that the

appeal is frivolous, forfeited, or dilatory. *Stewart*, 915 F.2d at 577.

Further, appeals from interlocutory, orders granting or denying injunctive relief present special considerations. Interlocutory, appellate review of a preliminary, injunction order pursuant to 28 U.S.C. § 1292(a)(1) will not divest the district court of its jurisdiction to act on the merits of the case pending appeal. *State of Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1490 (10th Cir. 1990) (citations omitted); Wright, Miller & Kane. Federal Practice and Procedure: Civil 2d § 3921.2. Rule 62 provides, in relevant part:

> Stay of Proceedings to Enforce a Judgment.
>
> (a) Automatic Stay; Exceptions--Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory, or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

* * *

> (c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

* * *

> (d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Fed. R. Civ. P. 62 (emphasis added). Rule 8 further provides:

> Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for

> such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action.

F.R.A.P. 8(a).

Although the language of Rule 62(c) appears to afford district courts extensive authority to grant injunctive relief pending appeal, courts addressing the issue have construed the rule more narrowly. Several circuits have held that the district court may not alter the injunction once an appeal has been filed except to maintain the status quo of the parties pending the appeal. *See, e.g., Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *Flynt Distributing Co., Inc. v. Harvey,* 734 F.2d 1389, 1392 n. 1 (9th Cir. 1984); *Lewis v. Tobacco Workers' Int'l Union,* 577 F.2d 1135 (4th Cir. 1978); *State of New York v. Nuclear Regulatory Comm 'n,* 550 F.2d 745, 758-759 (2d Cir. 1977); *Ideal Toy Corp. v. Sayco Doll Corp.,* 302 F.2d 623,625 (2d Cir. 1962). This narrow interpretation of Rule 62(c) derives from *Sayco Doll,* which involved a motion to vacate an injunction based on new evidence brought before the district court while the validity of the injunction was on appeal to the Second Circuit, which held:

> Once the appeal is taken, . . . jurisdiction passes to the appellate court. Thereafter the appellant is not usually entitled as of right to

> present new evidence or argument to the trial court, which in the exercise of a sound discretion will exercise jurisdiction only to preserve the status quo as of the time of appeal. Appellant's proper procedure is then to request leave of the court of appeals to proceed in the lower court. He need not even dismiss his appeal, for we have always been ready to suspend proceedings while new matter was introduced below. But absent permission of the appellate court to reopen, sound judicial administration demands that unless the judge is satisfied that his order was erroneous he shall use his power under Rule 62(c) only to preserve the status of the case as it sits before the court of appeals.

Sayco Doll, 302 F.2d at 625 (citation omitted).

More recently, in *Coastal Corp. v. Texas Eastern Corporation, supra,* the district court granted the plaintiffs' motion for a preliminary injunction, prohibiting the defendants from filing lawsuits challenging a tender offer in other jurisdictions. After the defendants appealed the preliminary injunction order, the trial court dissolved the injunction based on newly discovered evidence. The Fifth Circuit reversed, concluding that Rule 62(c) did not allow- the district court to dissolve the injunction and eliminate the appeal. *Coastal,* 869 F.2d at 820. According to the Fifth Circuit, "the powers of the district court over an injunction pending appeal should be limited to maintaining the status quo and ought not to extend to the point that the district court can

divest the court of appeals from jurisdiction while the issue is before us on appeal." *Id.*

Two circuits have concluded that, in some circumstances, the district court may alter the status quo by modifying an injunction during the pendency of an appeal. *See Board of Educ. of St. Louis v. State of Missouri,* 936 F.2d 993, 996 (8th Cir. 1991) (district court's ongoing supervision of integration of vocational educational programs requires it to retain the broadest discretion possible); *Ortho Pharmaceutical Corp. v. Amgen, Inc.,* 887 F.2d 460, 464 (3d Cir. 1989) (district court may alter status quo pursuant to Rule 62(c) if alteration "preserves the integrity" of the appeal). *See also Basicomputer Corp. v. Scott,* 973 F.2d 507, 513 (6th Cir. 1992) (declining to rule on issue). In *Ortho,* the plaintiff sought a modification of an injunction while an appeal was pending. The Third Circuit, like the Second and Fifth Circuits, held that Rule 62(c), though purporting to convey extensive authority to the district courts, did not permit a district court unlimited authority to modify a preliminary injunction. The Third Circuit, however, adopted a less narrow construction, holding that Rule 62(c) authorized the district court to take any of the listed actions as long as such action "preserv[ed] the integrity of the proceedings in the court of appeals." *Ortho,* 887 F.2d at 464. Since the modification requested by the plaintiff would impose additional requirements on the defendant, the district court concluded that the motion to modify transgressed the "status quo" limitation. On appeal, the Third Circuit implicitly agreed that the modification would alter the status quo, but concluded that the modification would preserve the integrity of the appeal by protecting the rights of the plaintiff, which rights were jeopardized in a manner not anticipated by the original

injunction. Thus, the Third Circuit concluded that the modification was within the authority provided by Rule 62(c) even though it altered the status quo.

The Tenth Circuit came closest to addressing this issue in *Chief Freight Lines Co. v. Local Union No. 886,* 514 F.2d 572 (10th Cir. 1975), in which an employer commenced an action in district court to enjoin a union from striking. On February 27, 1974, the district court judge announced orally in open court that he would enter an order granting the preliminary injunction; the union filed a notice of appeal on March 29, 1974. *Id.* at 578. On April 9 and 10, 1974, the district court heard further evidence and oral argument. The district court judge then entered detailed written findings and conclusions together with an injunctive order on April 10, 1974. *Id.* The union filed a second notice of appeal on April 17, 1994. *Id.* The Tenth Circuit concluded that the district court judge "intended to, and did on February 27, merely announce orally his conclusion to grant the preliminary injunction, but that he did not enter the preliminary injunction until April 10." *Id.* Thus, the Tenth Circuit deemed the written injunctive order of April 10 as the order from which an appeal was taken. *Chief Freight Lines,* however, does not mention Rule 62(c) or *Sayco Doll.* While one commentator suggests that *Chief Freight Lines* implies the Tenth Circuit would follow the majority rule, *see, e.g.,* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 3921.2 n. 28, I am not convinced that *Chief Freight Lines* provides guidance for the particular issue presented here. Thus, I conclude that the issue is one of first impression in this circuit.

The two predominant formulas are articulated by *Coastal and Ortho*. *Coastal* requires maintenance of the status quo as of the time of appeal, and *Ortho* speaks of preserving the integrity, of the appeal. The difference is subtle. *Ortho* recognizes, and *Coastal* fails to recognize, that the status quo itself may cause one of the parties irreparable injury and thereby threaten the appeal. *Ortho,* 882 F.2d at 814. Under such circumstances, it may be necessary to alter the status quo to prevent the injury and preserve the appeal. *Id.* The two formulas, however, have much more in common than in conflict. Regardless of the precise formula used, it is clear that any injunctive action taken pursuant to Rule 62(c) "must be designed to aid the appeal and, accordingly, may not materially alter the status of the case on appeal." A. Ides, *The Authority of a Federal District Court to Proceed After a Notice of Appeal Has Been Filed,* 143 F.R.D. 307, 321-322 (1992). Where, as here, modification of the injunction would not materially alter the status of the case on appeal, either paradigm allows the district court to modify, the injunction pursuant to Rule 62(c). Thus, I need not decide between the subtly different formulas.

As noted above, the June 10 order requires defendants to "provide financial assurance in the amount of $3,500,000 pursuant to 6 COLO. CODE REGS. 1007-3 § 266 and all applicable subparts." (Ord. of 6/10/98 at 46.) Defendants could have complied with the June 10 order by providing any type of financial assurance allowed by § 266, including a bond, trust, insurance, or any combination thereof. In light of defendants' insufficient trust proposal, however, the United States now moves for issuance of an order requiring defendants to provide a specific form of financial assurance allowed by § 266, a "Surety Bond Guaranteeing Payment into

a Closure and/or Post Closure Trust Fund." *See* 6 COLO. CODE REGS. 1007-3 § 266.14(f). The United States' motion can be characterized as either a motion to enforce the June 10 order or as a request for modification of the order. As noted above, the United States does not raise the issue of contempt. Nor does the United States seek to re-litigate any of the issues presented at the injunction hearing.

If construed as a motion to enforce the June 10 order, this court has continuing jurisdiction to address the United States' motion. *See Tyler v. City of Manhattan,* 118 F.3d 1400, 1402 n. 1 (10th Cir. 1997) (district court necessarily retained jurisdiction over parties until they complied with the terms of injunctive order even though injunctive order appealed). If construed as a motion to modify the June 10 order, jurisdiction also exists. The requested modification, if granted, does not materially alter the status of the appeal. Nor would granting the modification deprive or otherwise affect the jurisdiction of the Tenth Circuit over the appeal.

As no risk of interference exists, I conclude that this court has jurisdiction to entertain the United States' motion to enforce or modify, the injunction. I also conclude that this court retains jurisdiction to proceed with the action on the merits. *See State of Colorado v. Idarado Mining Co.,* 916 F.2d at 1490. Lastly, I conclude that the June 10 order, as an interlocutory., order granting mandatory, injunctive relief, is not automatically stayed by defendant's notice of appeal. Fed. R. Civ. P. 62(a); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2904. Thus, the June 10 order remains in effect. Contrary to the United States' assertion (Plf.'s Mot. Vacate Sched. at 4, 8), the order need not be "restored." Accordingly, I address the merits of the United

States' motion. I also vacate my previous order, entered in open court on August 6, 1998, establishing a briefing schedule regarding the issue of continuing jurisdiction.

IV. ANALYSIS OF THE UNITED STATES' MOTION TO ENFORCE OR MODIFY

The United States requests the issuance of an order directing defendants to obtain financial assurances in the form of a surety bond in the amount of $3,500,000 that complies with the provisions of 6 COLO. CODE REGS. 1007-3 § 266.14(f) ("Surety Bond Guaranteeing Payment into a Closure and/or Post Closure Trust Fund"). Considering the insufficiency and insecurity of defendants' proposed trust arrangement, the delay in compliance with the June 10 order caused thereby, and defendants' failure to respond adequately to the insufficiencies raised by the United States in its response to defendants' Show Cause Submission, I grant the United States' motion. Requiring defendants to provide financial assurance in the form of a proper surety bond will likely avoid further delay, provide clarity of purpose, and does not alter the status of the appeal.

Additionally, I attach to this order the documents attached to the United States' motion as Attachments A, B, and C. "Attachment A" describes the United States' requirements for the surety bond and standby trust to be obtained by defendants. "Attachment B" is a proposed draft of the surety bond instrument. "Attachment C" is a proposed draft of the standby trust agreement. I find and conclude that the stated requirements and the proposed drafts are reasonable and fair. The stated requirements and the proposed drafts also appear to comply with 6 COLO. CODE REGS. 1007-3 §

266.14(f). Accordingly, the surety bond and standby trust created by defendants shall comply with the requirements stated in the attachments and 6 COLO. CODE REGS. 1007-3 § 266.14(f). Further, the final drafts of the bond instrument and the standby trust agreement shall mimic the proposed drafts. The United States and defendants may, by stipulation, vary these requirements and terms. Such stipulation must be approved by the court.

Accordingly, I ORDER that:

(1) the briefing schedule regarding continuing jurisdiction, established in open court on August 6, 1998, is VACATED;

(2) the hearing set for October 2, 1998 at 3:30 p.m. is VACATED; and

(3) defendants SHALL PROVIDE financial assurances in the amount of $3,500,000 in the form of a surety, bond guaranteeing payment into a closure and/or post-closure trust fund pursuant to 6 COLO. CODE REGS. 1007-3 {} 266.14(f);

(4) the surety bond and standby trust shall comply, as set forth above with more particularity, with Attachments A, B, and C to this order;

(5) plaintiff and defendants may vary the requirements and terms of Attachments A, B, and C only by stipulation after approval by the court; and

(6) defendants shall so comply within twenty days or show good cause as to why they have not achieved such compliance.

Dated: August 17, 1998 in Denver, Colorado.

BY THE COURT:

/s/_____
LEWIS T. BABCOCK, JUDGE

ATTACHMENT A

With respect to the surety bond:

1. The Defendants must obtain a surety bond ("the bond") which conforms to the requirements of the Order and must submit the bond to EPA within ___ days after the effective date of the Order.

2. The wording in the bond must be identical to the wording in the bond format provided in Attachment B.

3. The bond must be effective as of the day Defendants submit the bond to EPA. The surety company issuing the bond and any co-sureties must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury. If the surety is using reinsurance, a Treasury reinsurance form must be submitted with the bond of within 45 days thereafter. If co-sureties are being used, the original bond must reflect that fact.

4. The Defendants must also establish a standby trust fund as provided in 6 CCR 1007-3 §§ 266.14(f) and 266.14(a) ("Surety Bond Guaranteeing Payment into a Closure and/or Post Closure Trust Fund" and "Closure and/or Post Closure Trust Fund"), except that the trust shall run to the benefit of EPA. Under the terms of the bond, all payments made thereunder shall be deposited by the surety directly into the standby trust fund in accordance with the instructions from EPA. Defendants shall submit an originally signed duplicate of the trust agreement to EPA with

the surety bond on the same day the trust agreement is fully executed. Only one standby trust shall be executed, although all
defendants may be grantors.

5. The bond must guarantee that Defendants will:

   (i) Fund the standby trust in an amount equal to the penal sum of the bond prior to the beginning of final closure of the facility; or

   (ii) Fund the standby trust fund in an amount equal to the penal sum within 15 days after an order to begin closure is issued by CDPHE, EPA, or a State court or other court of competent jurisdiction; or

   (iii) Provide alternate financial assurance as provided in 6 CCR 1007-3 § 266, Subpart A, and obtain EPA's written approval of the assurance provided, within 90 days after receipt by both Defendants and EPA of a notice of cancellation of the bond from the surety.

6. The penal amount of the bond must be three million five hundred thousand U.S. dollars (US $3,500,000.00) or more.

7. Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to Defendants and to EPA. Cancellation may not occur, however, during the 120 days beginning on the

date of receipt of the notice of cancellation by both Defendants and EPA, as evidenced by the return receipts.

8. Defendants may cancel the bond if EPA has given prior written consent based on its receipt of evidence of alternate financial assurance as specified in 6 CCR 1007-3 § 266, Subpart A.

With respect to the standby trust:

1. Defendants must submit an originally signed duplicate of the trust agreement to EPA within ___ days after the effective date of the Court's order.

2. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

3. The wording of the trust agreement must be identical to the wording specified in Attachment C. Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current closure and/or post-closure cost estimate covered by the agreement.

4. Whenever the current closure and/or post-closure cost estimate changes, Defendants must compare the new cost estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, Defendants, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its

value after this deposit at least equals the amount of the current closure and/or post-closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

5. If the value of the trust fund is greater than the current amount of the current closure and/or post-closure cost estimate, Defendants may submit a written request to EPA for the release of the amount in excess of the current closure and/or post-closure cost estimate.

6. If Defendants substitute other financial assurance as specified in Section 266 for all or part of the trust fund, they may submit a written request to EPA for release of the amount in excess of the $3,500,000.00 covered by the trust fund less closure or post-closure costs already paid by the trust fund.

7. Within 60 days after receiving a request from Defendants for release of funds as specified in paragraphs 5 or 6 above, EPA will instruct the trustee to release to Defendants such funds as EPA specifies in writing.

8. Closure and post-closure care reimbursements:

   (i) After beginning partial or final closure, Defendants or another person authorized to conduct partial or final closure may request reimbursements for partial or final closure expenditures by submitting itemized bills to EPA. Defendants may request reimbursements for partial closure only if sufficient funds are

remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for partial or final closure activities, EPA will instruct the trustee to make reimbursements in those amounts as EPA specifies in writing, if EPA determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If EPA has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, it may withhold reimbursements of such amounts as it deems prudent until it determines, in accordance with 266.14(1) that Defendants are no longer required to maintain financial assurance for final closure of the facility. IF EPA does not instruct the trustee to make such reimbursements, it will provide Defendants with a detailed written statement of reasons.

(ii) During the period of post-closure care, EPA may approve a release of funds if Defendants demonstrate to EPA that the value of the trust fund exceeds the remaining cost of post-closure care.

(iii) Defendants or any other person authorized to conduct post-closure care may request reimbursements for post-closure care expenditures by submitting itemized bill to

EPA. Within 60 days after receiving bills for post-closure care activities, EPA will instruct the trustee to make reimbursements in those amounts as EPA specifies in writing, if EPA determines that the post-closure care expenditures are in accordance with the approved post-closure plan or otherwise justified. If EPA does not instruct the trustee to make such reimbursements, it will provide Defendants with a detailed written statement of reasons.

9. EPA will agree to termination of the trust when:

(i) Defendants substitute alternate financial assurance as specified in 6 CCR 1007-3 § 266, Subpart A; or

(ii) EPA releases Defendants from the requirements of Section 266 in accordance with
6 CCR 1007-3 § 266.14(1).

ATTACHMENT B

FINANCIAL GUARANTEE BOND

Date bond executed: _____

Effective date: _____

Principal: [Legal name and business address of owner or operator]

Type of organization: [Insert "individual", "joint venture", "partnership", or "corporation"]

State of incorporation: _____

Surety(ies): [Name(s) and business address(es)]

EPA ID No.: COD007060999
Power Engineering Company
2525 Delaware Street
Denver, Colorado
Remediation Amount: US $3,500,000.00

Total penal sum of bond: US $3,500,000.00

Surety's bond number: _____

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the United States Environmental Protection Agency ("EPA") in the above penal sum for the payment of which we bind ourselves, our heirs,

executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(les) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally; only for the purpose of allowing a joint action or action against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required, under the Colorado Hazardous Waste Management Regulations, to have a permit or interim status in order to own or operate each hazardous waste management facility identified above, and

Whereas said Principal is required to provide financial assurance for closure, or closure and post-closure care, as a condition of the permit or interim status, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance, unless an alternate mechanism has been established by the State of Colorado to directly receive monies.

Now, Therefore, the conditions of the obligation are such that if the Principal shall faithfully, before the beginning of final closure of each facility identified above, fund the standby trust fund in the amount(s) identified above for the facility.

Or, if the Principal shall fund the standby trust fund in such amount(s) within 15 days after an order to begin closure is

issued by the Colorado Department of Public Health and Environment ("the Department") or EPA or a U.S. district court or other court of competent jurisdiction,

Or, if the Principal shall provide alternate financial assurance, as specified in these regulations and obtain EPA's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and EPA from the Surety(ies), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by EPA that the Principal has failed to perform as guaranteed by this bind, the Surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by EPA.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to EPA, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and EPA, as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by EPA.

In Witness Whereof, the Principal and Surety(ies) have executed this Financial Guarantee Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 6 CCR 1007-3 § 266.18(f) as such regulations were constituted on the date this bond was executed, with the exception of the substitution of EPA for the Colorado Department of Public Health and Environment.

Principal

[Signature(s)]

[Name(s)]

[Title(s)]

[Corporate seal]

Corporate Surety(ies)

[Name and address]

State of incorporation: _____

Liability limit: $_____

[Signature(s)]

[Name(s) and Title(s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: _____

ATTACHMENT C

TRUST AGREEMENT

Trust Agreement, the "Agreement", entered into as of [date] by and between [name of the owner or operator], a [name of State][insert "corporation", "partnership", "association", or "proprietorship"], the "Grantor", and [name of Corporate trustee], [insert "incorporated in the State of Colorado" or "a national bank"], the "Trustee."

Whereas, the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division, a regulatory Agency of the State of Colorado, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of the facility,

Whereas, the Grantor has elected to establish a trust to provide all or a pan of such financial assurance for the facilities identified herein,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this Agreement, and the Trustee is willing to act as trustee,

Now, Therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

Section 2: Identification of Facilities and Cost Estimates.

This Agreement pertains to the facilities and cost estimates identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number, name, address, and the current closure and/or post-closure cost estimates, or portions thereof, for which financial assurance is demonstrated by this Agreement].

Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, the "Fund", for the benefit of the United States Environmental Protection Agency (EPA"). The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the

Trustee, In Trust, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by EPA.

Section 4. Payment for Closure and Post-Closure Care.

The Trustee shall make payments from the Fund as EPA shall direct, in writing, to provide for the payment of the costs of closure and/or post-closure care of the facilities covered by this Agreement. The Trustee shall reimburse the Grantor or other persons specified by EPA from the Fund for closure and post-closure expenditures in such amount as EPA shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as EPA specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payment Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and

managing the Fund, the Trustee shall discharge his/her duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; EXCEPT THAT:

(i) Securities or other obligations of Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment.

The Trustee is express authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provision of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central

depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-beating accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation.

The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to EPA a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary sate of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and EPA shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes the administration of the trust in writing sent to the Grantor, EPA, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee.

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by EPA to the Trustee shall be in writing, signed by the EPA Regional Administrator or his/her designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the

right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

Section 15. Notice of Nonpayment.

[Deleted]

Section 16. Standby Trust Exemptions.

Unless this trust fund is fumed pursuant to the requirements of Part 266 of the Colorado Hazardous Waste Regulations 6 CCR 1007-3, as mended, updating of Schedule A hereto as current closure or post-closure costs shall not be required, nor shall annual valuations under Section 10 be required.

Section 17. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and EPA, or by the Trustee and EPA if the Grantor ceases to exist.

Section 18. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee and EPA, or by the Trustee and EPA, if the Grantor ceases to exist. Upon termination of the Trust, all

remaining trust property, less final trust administration expenses, shall be delivered to the Grantors.

Section 19. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or EPA issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor falls to provide such defense.

Section 20. Choice of Law.

This Agreement shall be administered, construed, and enforced according to the laws of the State of Colorado.

Section 21. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be here unto affixed and attested as of

the date first above written: The parties below certify that the wording of this Agreement is identical to the wording specified in § 266.18(a)(1) as such regulations were constituted on the date first above written, with the exception of the substitution of EPA for the Colorado Department of Public Health and Environment and the deletion of Section 15 ('Notice of Nonpayment).

[Signature of Grantor]
[Title]
[Seal]

Attest: [Signature of Attestor]
[Title]

[Signature of Trustee]
[Name of Trustee]
[Title]
[Seal]

Attest: [Signature of Attestor]
[Title]

State of _____

County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 97-B-1654

The undersigned certifies that a copy of the foregoing order was served on August 17, 1998, by:

(X) delivery to:

Linda Surbaugh
Assistant U. S. Attorney

Magistrate Judge O. Edward Schlatter

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

John N. Moscato
Environmental Enforcement Section
Environment & Natural
Resources Division
United States Department of Justice
999 18th Street, Suite 945
Denver, CO 80202

John F. McBride, Esq.
John J. Zodrow, Esq.
Zodrow Et Al. P.C.
Independence Plaza, Suite 1700
1050 Seventeenth Street
Denver, CO 80265

Thomas E. Sitz
Enforcement Attorney
U.S. Environmental Protection Agency
Region VIII
999 18th Street, Suite 500
Denver, CO 80202

John L. Watson, Esq.
Freeborn & Peters
950 Seventeenth Street, Suite 2600
Denver, CO 80202-2826

/s/_____
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

[Filed June 10, 1998]

Civil Action No. 97-B-1654

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	)
	)
POWER ENGINEERING COMPANY,	)
REDOUBT, LTD., and RICHARD J.	)
LILIENTHAL,	)
Defendants/Third Party Plaintiffs,	)
	)
v.	)
	)
JACK LILIENTHAL,	)
Third Party Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

Plaintiff, the United States of America (the "United States"), acting on behalf of the United States Environmental Protection Agency (the "EPA"), pursuant to Fed. R. Civ. P.

65 and section 3008(a)(1) of the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. § 6928(a)(1) (1994 & Supp. 1997), seeks a preliminary injunction directing the defendants, Power Engineering Company ("PEC"), Redoubt, Ltd. ("Redoubt"), and Richard Lilienthal ("Lilienthal"), to comply with state regulations adopted by the Colorado Department of Public Health and Environment (the "CDPHE"), found at 6 COLO. CODE REGS. 1007-3 § 266. These regulations require owners and operators of all hazardous waste facilities to document that they have secured the resources required to close their facilities in an appropriate and safe manner, and to pay third-party claims that may arise from its operations.

The United States commenced this action on August 1, 1997, alleging eight claims: (1) treatment of hazardous waste without a permit or interim status; (2) disposal of hazardous waste without a permit or interim status; (3) shipment of hazardous waste to an un-permitted facility; (4) improper container management; (5) storage of hazardous waste without a permit or interim status; (6) failure to provide employee training; (7) failure to have a hazardous waste contingency plan; and (8) illegal operations (failure to have a groundwater monitoring program, failure to have a closure plan, failure to minimize releases of hazardous waste, and failure to obtain and provide financial assurances for closure and post-closure). The United States also alleges that Power Engineering has failed to comply with CDPHE's Administrative Compliance Order.

As discussed on the record, this is an "overfile" action, indicating that the EPA is displeased with the manner in which the CDPHE has sought enforcement of federal and

state regulations. The United States, therefore, at the request of the EPA, exercises its authority to seek defendants' compliance with Colorado hazardous waste regulations. Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 (1994) and venue is proper pursuant to 28 U.S.C. §§ 1391 (b), 1391(c), and 1395(a). A hearing was held beginning May 11, 1998. Based on the evidence presented and for the reasons set forth below, I grant the United States' motion for preliminary injunction.

I. STATUTORY AND REGULATORY GUIDELINES

RCRA is a comprehensive environmental statute designed to protect the public health and environment by ensuring the proper handling of solid and hazardous wastes. 42 U.S.C. § 6902(a). RCRA regulates the generation, treatment, storage, transportation, and disposal of solid and hazardous wastes. *See* 42 U.S.C. §§ 6922-6925. This comprehensive regulatory scheme is frequently described as "cradle-to-grave" oversight. *See Sierra Club v. United States Dept. of Energy,* 770 F. Supp. 578, 579 (D.Colo. 1991); *see also* H. R. Rep. No. 96-1016, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

Hazardous waste is tracked and regulated from the point of generation, through storage, transportation, and treatment, and to the point of ultimate disposal. The intent of this regulatory scheme is to minimize the potential for public health and environmental problems resulting from improper management of hazardous waste. The potential for public health and environmental problems, including hazards associated with fire, explosion, direct contact, and contamination of air, surface water, and groundwater

resulting from inadequate management is well-documented. *See, e.g.*, H. R. Rep. No. 94-1491, at 17-24 (1976), *reprinted in* 1980 U.S.C.C.A.N. 6238, 6254-6261 (documenting hazardous waste tragedies in several states).

Owners and operators of hazardous waste facilities must establish and maintain financial assurances for proper closure and, if necessary, post-closure care of the facility, as well as liability insurance for bodily injury and property damage to third parties resulting from sudden and accidental occurrences at the facility. 6 COLO. CODE REGS. 1007-3 § 266; 40 C.F.R. § 265. These financial responsibility, requirements ensure that funds are available for proper closure and, if necessary, post-closure care of the facility.

As enacted in 1976, RCRA required two types of hazardous waste facilities to provide financial assurances: (1) those with final operating permits; and (2) those with "interim status" that had applied for final operating permits. Congress deemed it impractical to halt all hazardous waste activity, pending the issuance of permits. Congress, therefore, created interim status, allowing the EPA to treat existing facilities with pending permit applications as having been issued a permit. 42 U.S.C. § 6925(e)(1); *United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314, 316 (D.S.C.) *aff'd in part, vacated in part*, 865 F.2d 1261 (4th Cir. 1988).

A facility in existence on November 19, 1980 could obtain interim status by noticing the EPA of its activities and submitting a Part A permit application. 42 U.S.C. § 6925(e)(1); 40 C.F.R. §§ 265.1(b), 270.10(e). The Part A application contains information concerning the nature of the applicant's business, a scale drawing, photographs and a

topographic map of the facility, a description of its hazardous waste management processes and the design capacity of these processes, a specification of the types and quantities of hazardous wastes processed, stored, or disposed of at the facility, as well as information regarding permits or construction approvals. 40 C.F.R. § 270.14. A facility operating pursuant to interim status is limited to the types of wastes and procedures specified in the Part A application and the facility must comply with the operating standards of 40 C.F.R. § 265, which include the provision of financial assurances.

In 1984, primarily because of widespread industry noncompliance, Congress amended RCRA to provide that all interim status facilities would lose their interim status unless they certified by November 8, 1985, that they complied with all applicable groundwater monitoring and financial responsibility requirements. Hazardous and Solid Waste Amendments of 1984, P. L. No. 98-616, 98 Stat. 3221, codified at 42 U.S.C. § 6925(e)(2) (Supp. II 1984). Upon losing interim status, the facility must have immediately ceased its hazardous waste management operations and, within fifteen days, submitted a closure plan for approval by the state or the EPA. 42 U.S.C. § 6925(a); 40 C.F.R. § 265.112(d)(3)(i). The facility must have begun final closure within ninety days of approval of that closure plan and achieved closure within 18 days of approval of the closure plan, unless the state or the EPA allowed an extension of the closure period. 40 C.F.R. § 265.113.

Closure of a hazardous waste facility must be performed in a manner that:

> (a) Minimizes the need for further maintenance, and
> (b) Controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere, and
> (c) Complies with the closure requirements of [other regulations promulgated under RCRA].

40 C.F.R. § 265.111. Even after closure has been completed, the owner or operator may be required to maintain post-closure care of the facility, for a period of thirty years. 40 C.F.R. § 265.117. Thus, RCRA provides for extensive regulation of a hazardous waste facility long after the facility has stopped operating. *See American Iron & Steel Institute v. EPA,* 886 F.2d 390, 393 (D.C.Cir. 1989) ("While invariably described as a 'cradle-to-grave' system, [RCRA] in fact reaches. . . well beyond the grave.").

In an effort to secure enforcement of RCRA's provisions to the fullest extent possible, Congress conferred enforcement power upon the EPA, as well as federally authorized state agencies and United States citizens. RCRA

allows states to implement their own programs in lieu of the federal program if the state's program is "equivalent to" and "consistent with" the federal program and provides for "adequate enforcement of compliance." 42 U.S.C. {} 6926(b).

The EPA delegated to the State of Colorado authorization to operate a federally authorized hazardous waste program. *See, generally,* 49 Fed. Reg. 41036 (Oct. 19, 1984); 54 Fed. Reg. 20847 (May 15, 1989); 56 Fed. Reg. 21601 (May 10, 1991). Colorado has promulgated regulations, pursuant to the Colorado Hazardous Waste Management Act ("CHWMA"), C.R.S. 9 25-15-302(2) and (3), that specifically govern generators of hazardous waste and the operation and maintenance of hazardous waste treatment, storage, and disposal facilities. 6 COLO. CODE REGS. 1007-3 §§ 262, 264-268. Any action taken by the State of Colorado pursuant to its federally authorized hazardous waste program "shall have the same force and effect as action taken by the [EPA]." 42 U.S.C. § 6926(d).

The EPA, however, retains the right to bring enforcement actions compelling compliance with Colorado's hazardous waste regulations. 42 U.S.C. §§ 6928, 6934, and 6973; *accord* 49 Fed. Reg. 41036 (Oct. 19, 1984); 51 Fed. Reg. 37729 (Oct. 26, 1986); 54 Fed. Reg. 20847 (May 12, 1989); 56 Fed. Reg. 21601 (May 10, 1991); 59 Fed. Reg. 16568 (April 7, 1994). Whenever the EPA determines that a violation of RCRA has occurred, the EPA ". . may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction." 42 U.S.C. § 6928(a)(1).

II. PRELIMINARY INJUNCTION STANDARDS

Because a preliminary, injunction is an extraordinary remedy, "the right to relief must be clear and unequivocal." *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991). Preliminary injunctions that preserve the status quo pending a trial on the merits are known as "prohibitory" injunctions. Injunctions that disturb the status quo, by requiring some affirmative act, are denominated "mandatory" injunctions. Because mandatory, injunctions are more burdensome than prohibitory, injunctions, the plaintiff must demonstrate entitlement to the injunction by compelling evidence. *Visa*, 936 F.2d at 1099. This heightened evidentiary burden must also be met when the issuance of the injunction would provide the plaintiff with substantially all the relief that would be available following success on the merits. *Phillip v. Fairfield Univ.*, 118 F.3d 131,133 (2d Cir. 1997).

A court passing judgment on a motion for preliminary, injunction considers whether plaintiff establishes that: (1) it will suffer irreparable injury unless an injunction is issued; (2) its threatened injury outweighs any harm the proposed injunction may cause to the opposing party; (3) it will likely prevail on the merits of the litigation; and (4) an injunction, if issued, would not be adverse to the public interest. *Chemical Weapons Working Group, Inc. v. United States Dept. of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997) (citation omitted); *accord Visa*, 936 F.2d at 1098; *United States ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc.*, 883 F.2d 886, 888-889 (10th Cir. 1989).

Normally, the most important equitable factor is irreparable harm. When a case is brought pursuant to an environmental or public health statute, however, the primary focus shifts from irreparable harm to concern for the general public interest. *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313 (1982); *accord Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331, 337-338 (4th Cir. 1983); *Wilson v. Amoco Corp.,* 989 F. Supp. 1159, 1171 (D.Wyo. 1998) (citations omitted). A plaintiff seeking injunctive relief, however, still must demonstrate irreparable harm in the absence of express Congressional intent to the contrary. *Wilson,* 989 F. Supp. at 1171 (citing *Romero-Barcelo,* 456 U.S. at 312). Based on these established standards, I will apply the traditional equitable factors, as modified for RCRA, and weigh more heavily the general public's interest in the issuance of the injunction. Because the United States seeks a mandatory injunction, however, it bears the burden of showing that the four factors, when balanced, weigh compellingly in its favor.

III. FINDINGS OF FACT

The following findings of fact are based upon the stipulations of the parties and the evidence presented at the hearing. These findings of fact apply only to the United States' motion for preliminary injunction.

Both PEC and Redoubt are Colorado corporations. PEC operates a metal refinishing business located at 2525 South Delaware Street in Denver, Colorado ("the Facility"). Redoubt owns the land and buildings leased to PEC. Lilienthal is the president of PEC and owns 51% of the outstanding stock of both PEC and Redoubt. The Lilienthal

Family Trust owns the remaining minority, interests of both PEC and Redoubt. Lilienthal is now, and has been, involved in making management decisions for PEC and Redoubt, including decisions regarding environmental compliance. (Stip. ¶¶ 6-9.)

PEC's business consists primarily of refinishing metal crankshafts, connecting rods, and rod journals for large diesel engines used in heavy equipment. PEC's metal refinishing process includes stripping, preparation of the surface for refinishing, and chrome-plating. As a result of PEC's operations, the Facility produces more than 1,000 kilograms per month and stores more than 6,000 kilograms per month of"hazardous waste" as that term is defined by 6 COLO. CODE RETS. 1007-3 § 261.3. The Facility generates approximately thirteen different "waste streams" including, but not limited to, arsenic, lead, mercury, and hexavalent chromium contaminated media that exceed established regulatory toxicity, standards. Hexavalent chromium is a corrosive hazardous waste and known carcinogen. CONDENSED CHEMICAL DICTIONARY at 249 (10th ed. 1981).

In 1992, Denver Health and Hospitals contacted the CDPHE concerning a discharge into the Platte River of high levels of hexavalent chromium. Denver Health and Hospitals had investigated all of the businesses in the area and determined that PEC was the likely source of that discharge. The CDPHE then conducted compliance review inspections at the Facility on August 3, 1992, September 3-4, 1992, September 25, 1992, February 23, 1993, and March 10, 1993. (Stip. ¶ 18; Ex. I at 15-16.) During these inspections, the CDPHE inspector observed and reported numerous

violations of Federal and Colorado regulations governing treatment, storage, and disposal of hazardous waste. The inspector communicated the nature of these violations to PEC's representative. (Ex. 1 at 101, 110-111,130-131,132-134, and 139-140.) As a result of these inspections, the CDPHE prepared "Notice of Inspection" reports, signed by the CDPHE inspector and PEC's representative. Based on the stipulations and evidence from the hearing, I find that PEC is guilty of numerous violations of Colorado hazardous waste regulations. While many of the violations occurred in the past, some violations continue.

a. Illegal Treatment, Disposal, and Storage of Hazardous Waste

PEC has never filed a Part A notification, a Part B permit application, received an EPA or State of Colorado permit, or attained interim status for the treatment, storage, or disposal of hazardous waste. (Stip. ¶ 42.) Michael Hansen, PEC's Environmental Manager, testified that, after the CDPHE informed PEC in 1993 that its storage and disposal of hazardous waste without a permit violated federal and state regulations, "We looked up part B and saw that was too much for us to do." PEC concedes, however, that it engaged in treatment, storage, and disposal of hazardous waste.

1. Treatment

On August 3, 1992, a CDPHE inspector notified PEC that its placement of electrostripping and plating waste into an evaporation trait and an annealing oven at the Facility constituted treatment of hazardous waste without obtaining a permit or Interim Status from the EPA or the State of

Colorado. PEC utilized the evaporation unit (Exs. 11-12) and the annealing oven to "de-water" and recover chrome waste. (Stip. ¶¶ 20-22.) Approximately thirty-days after the August 3, 1992 inspection, PEC closed the evaporation unit pursuant to a plan submitted to and approved by the CDPHE. (Stip. ¶ 66.) The annealing oven, however, was not closed pursuant to a closure plan submitted to and approved by the CDPHE. Rather, the annealing oven was dismantled and sold for scrap metal by PEC in 1992. The evidence shows that, when PEC closed its annealing oven and evaporator in 1992, it ceased "treatment" of hazardous waste as that term is defined by 6 COLO. CODE REGS. 1007-3 § 260.10. The United States concedes that, based on the limited information available from its files and a site review conducted on April 2, 1998, PEC is not currently treating waste. (Stip. ¶ 67.)

2. Disposal

From 1978 to 1992, hazardous waste leaked into the soil beneath the Facility's 17 chrome-plating tanks. (Stip. ¶ 26; Exs. 3, 4.) The plating tanks are located inside the Facility's main building. As originally installed and used, the plating tanks were composed of steel with PVC lining, situated on a floor of earth and timber or within a concrete pit. Beginning in 1985 and concluding in 1994, PEC installed additional containment structures underneath the plating tanks.

During installation of these additional containment structures, PEC excavated some, but not all, of the soil beneath plating tanks. Although PEC 'knew that the soil was discolored by chrome contamination, PEC did not investigate the precise toxicity of the soil or ascertain the quantity of contaminated soil. PEC placed some of the excavated soil into

three open waste piles on land adjacent to the Facility's main building. (Answer ¶ 24; Stip. ¶ 27; Exs. 7-10.) Two of the piles exist on land owned by Redoubt and the third pile was placed on adjacent land owned by the Atchison, Topeka & Santa Fe Railroad. These three waste piles remain there today. (Answer ¶ 24; Stip. ¶ 27.) PEC placed the remainder of excavated soil into fifty-five gallon drums (Ex. 16), which PEC eventually shipped to a permitted waste disposal facility in 1993.

PEC utilizes "air scrubbers," also known as "air misters," installed in 1978, to draw air from above the plating baths located inside the Facility's main building. The air-cleansing process causes hexavalent chromium, lead, mercury, and arsenic to condense in aqueous form inside the ducts located outside the Facility's main building. On June 19, 1992, PEC obtained initial approval from the CDPHE for an air pollution emission permit pertaining to the air scrubbers. (Ex. II). The initial approval allows emission of 0.83 lbs/hour or 1.5 tons/year of "chromic acid." The record does not disclose whether PEC obtained final approval for air emissions of chromic acid or other hazardous wastes.

The ducts have discharged and continue to discharge air as well as a mist of hexavalent chromium, lead, mercury, and arsenic. Christopher Erzinger, the CDPHE's Environmental Protection Specialist and lead inspector of the Facility beginning in 1992, testified that the mist contained hexavalent chromium in the form of a "suspended liquid." This testimony is uncontroverted. This mist condensed, and continues to condense, on the soil adjacent to the air scrubbers. Such condensation is evidenced by stained soil extending approximately thirty, feet from the Facility's main

building towards the west. (Exs. 18-19.) The CDPHE sampled this soil and determined that it contained 360 ppm (parts per million) of hexavalent chromium. The CDPHE's established toxicity level for hexavalent chromium in soil is 5 ppm.

Beginning in 1978, a yellow/orange liquid leaked from air scrubbers down the west side of the Facility's main building into the soil. (Ex. 6.) The CDPHE assayed this liquid in 1992 and determined that it contained 250,000 ppm of hexavalent chromium, 50,000 times the concentration permissible in soil. Despite having knowledge of the leaking liquid since the late 1980's, and despite being informed by the CDPHE in 1992 that allowing such liquid to leak into the soil constituted illegal disposal, PEC did nothing to repair the leaks until August 1994. (Ex. 55.) Although the yellow/orange liquid no longer leaks down the west side of the Facility's main building into the soil, the soil remains contaminated.

3. Storage

At times after August 1, 1992, PEC stored at the Facility unlabeled drums containing chromium-contaminated byproducts, open drums containing chromium wastes, and drums without marked accumulation dates. PEC also failed to maintain adequate aisle space between its stored drums. (Stip. ¶¶ 31-34.)

On August 3, 1992, several fifty-five gallon drums stored inside the east-central portion of the Facility's main building that contained hazardous waste had accumulated for over one year. (Exs. 13-15.) Also on August 3, 1992, several

fifty-five gallon drams stored outside the east side of the Facility's main building that contained hazardous waste from grinding operations had accumulated for at least three years. (Stip. ¶ 50; Ex. 17.)

On August 3, 1992, PEC stored approximately one hundred drums containing chrome-contaminated soil on the southwest exterior dock of the Facility's main building. (Stip. ¶ 52; Ex. 16.) Some, but not all, of the drums stored on the southwest exterior dock had been there for seven years by August 3, 1992. Also on August 3, 1992, approximately nine drums in the southwest external storage area containing hazardous waste were not labeled as containing hazardous waste, did not have lids, and did not have marked accumulation dates. (Stip. ¶ 54.) As of August 3, 1992, PEC stored drums containing hazardous waste at the Facility for periods in excess of the ninety-day storage limitation for generator facilities set forth in 40 C.F.R. § 262.34. (Stip. ¶ 57.) PEC does not currently have an EPA or State of Colorado permit or Interim Status for the storage of hazardous waste beyond the ninety-day limit. (Stip. ¶ 56.) Nor has PEC ever sought or obtained an exemption from the ninety-day storage limitation period for generator facilities. (Stip. ¶ 38.)

PEC is managing hazardous wastes currently generated by the Facility in compliance with applicable storage regulations. (Stip. ¶ 65.) Waste currently generated is stored in properly labeled containers with adequate aisle space, transported to a permanent disposal facility, and stored at the Facility for less than ninety days. (Stip. ¶ 65.) All drums of hazardous waste that were present and accumulating at the Facility for over ninety, days were transported from the Facility for disposal at a permitted disposal facility by January

1994. (Stip. ¶ 68.) The United States concedes that, based on the limited information available in its files and the site review conducted on April 2, 1998, PEC is complying with pre-transport accumulation time requirements. (Stip. ¶ 65.)

b. Failure to Provide Notice of Activities

On May 14, 1986, PEC notified the CDPHE that it was a generator of D002 (corrosive), D000 (toxic), F006 (waste water treatment sludge), U226 (111 trichlorethane), and &080 (methylene chloride) hazardous wastes. (Ex. 1 at 11). Although the notice references generic codes for corrosive and toxic wastes, PEC failed to notify the CDPHE that it generated hexavalent chromium. While the record indicates PEC subsequently notified the CDPHE on March 10, 1993 that it is a large quantity generator of hazardous waste, including those wastes identified as D007 (chromium), D008 (lead), and D009 (mercury) (Stip. ¶ 17; Ex. 1 at 15-16), PEC did not adequately disclose its generation, treatment, storage, and disposal of hazardous waste until cited for numerous violations of the RCRA and its implementing regulations.

The evidence shows that PEC failed to assess adequately its generation, treatment, storage, and disposal of hazardous waste. The evidence also shows that neither the CDPHE nor the EPA knew the severity and extent of PEC's noncompliance until the August 3, 1992 inspection. Defendants' failure to report accurately their activities impaired the ability of the CDPHE and the EPA to regulate effectively PEC's generation, treatment, storage, and disposal of hazardous wastes. As Walter Avramenko, the CDPHE's Hazardous Waste Cleanup and Permitting Unit Leader,

testified, had PEC notified the CDPHE that it operated a treatment, storage, or disposal facility, the permitting requirements would have attached and, as part of those requirements, the CDPHE would have expected PEC to obtain a permit and provide closure plans, post-closure plans, and financial assurances.

c. Contamination of Groundwater and Surface Water

As a result of this illegal disposal and storage of hazardous waste, groundwater at and under the Facility, as well as groundwater under areas outside the Facility, is contaminated with levels of hexavalent chromium that greatly exceed established toxicity standards. (Stip. ¶¶ 3940.) Two geologists, both qualified as experts in the field of groundwater hydrology, testified regarding groundwater contamination.

Both Michael Wireman ("Wireman"), expert for the United States, and Michael Galloway ("Galloway"), expert for defendants, testified that a plume of chrome contamination originates at the southwest corner of the Facility and extends approximately 3,310 feet in a north-northwesterly direction to the South Platte River. (Exs. 26, 27.) The contaminated groundwater forms part of the South Platte Valley Fill Aquifer, which is a quickly moving aquifer with a steep gradient when compared to other aquifers in the region. The aquifer and the South Platte River are hydrologically connected. The bedrock gradient directs the aquifer towards the South Platte River. Preferential flow paths created by storm drainage pipes and other water conduits probably accelerate the time of contaminant transport to the South Platte River. Wireman believes the time of contaminant

transport from the Facility to the South Platte River at eight to ten years. I find Wireman's opinion credible.

The CDPHE's established toxicity level for hexavalent chromium in groundwater is 100 μg/L (micrograms per liter). The EPA tests detected 77,600 μg/L of hexavalent chromium at the heart of the contaminant plume in 1997, one of the highest concentrations in recent years. At the VFW outfall, a storm pipe that drains into the South Platte River where the plume intersects with the river, EPA groundwater tests detected 3,200 μg/L of hexavalent chromium. At the Harvard Gulch outfall, a water conduit that runs through the plume but intersects the South Platte River south of the plume's intersection with the river, EPA tests detect 280 μg/L of hexavalent chromium. (Exs. 26, 27.)

The facility, began operations in the late 1970's. Most of the plating tanks were installed in 1977. (Ex. Y, App. 3.) Hexavalent chromium from the Facility first reached the South Platte river in approximately 1986, as indicated by water samples taken by the Denver Department of Health. The CDPHE's established toxicity level for hexavalent chromium in South Platte river surface water is 16 μg/L for chronic conditions and 11 μg/L for acute conditions. In 1985, water samples detected 1 μg/L of hexavalent chromium in the South Platte River near the Facility. Samples taken in 1987 and 1988 detected approximately 100 μg/L of hexavalent chromium at the same site, leading to the conclusion that hexavalent chromium disposed by PEC in 1977 reached the South Platte River in 1986 or 1987. This evidence further supports Wireman's eight to ten year transport rate opinion. In November 1989, samples detected more than 100 μg/L of

hexavalent chromium at the same site. Both experts testified that the following are sources or probable sources of the hexavalent chromium plume: the three open waste piles of soil excavated from beneath the plating tanks, the soil remaining beneath the plating tanks, and the soil contaminated by the air scrubbers. These sources will continue to create a contaminant plume until remediated.

d. Issuance of Compliance and Administrative Penalty Orders

The CDPHE inspected the Facility on May 11-12, 1993 and January 27, 1994, again observing and reporting violations of federal and state regulations regarding storage and disposal of hazardous waste. The CDPHE issued an Initial Compliance Order on July 28, 1994. Defendants requested an informal conference with CDPHE, staying the Initial Compliance Order. The CDPHE and defendants held informal conferences between September 1994 and June 1996.

The CDPHE then issued a Final Administrative Compliance Order on June 13, 1996. Defendants did not appeal the Final Compliance Order, which requires, inter alia: (1) immediate compliance with applicable hazardous waste laws and regulations; (2) refraining from the treatment, storage, and disposal of hazardous waste without obtaining either Interim Status or a Part B permit; (3) proper management of existing hazardous waste; (4) submission, for review and approval, of a plan for conducting weekly inspections of containers that contain hazardous waste; (5) submission of a complete 1990/1991 Biennial Report that reflects all hazardous waste generated, treated, stored, and disposed of during years covered by such report; (6)

submission of an updated 1992 / 1993 Biennial Report that reflects all hazardous waste codes applicable to PEC's off-site disposal; (7) implementation of the "Removal Plan for Chrome Contaminated Stockpiled Soils" that the CDPHE conditionally approved on July 20, 1995; (8) submission for review and approval of a soil characterization work plan and groundwater sampling work plan; (9) submission for review and approval of a corrective measure study plan that evaluates the alternatives of remedial action to prevent, mitigate, and remediate the release of hazardous waste from the Facility; and (10) within thirty, days of the CDPHE's approval of the corrective measure study plan, implementation of the selected remedial alternative. (Ex. 21 at 20-26.)

Defendants have complied with certain requirements of the Final Compliance Order. PEC submitted several requested plans to the CDPHE regarding emergency preparedness, personnel training, soil characterization, and groundwater sampling. (Exs. S-Z, A1.) The CDPHE rejected as deficient the first draft of some of these plans. Some of the plans have now been approved. At least one plan has not been reviewed by the CDPHE. In accordance with the Final Compliance Order, PEC also ceased treating waste in September 1992.

Defendants, however, have failed to implement the "Removal Plan for Chrome Contaminated Stockpiled Soils," conditionally approved by the CDPHE on July 20, 1995, regarding the three open waste piles of contaminated soil. The Final Compliance Order required defendants to excavate, containerize, and transport this contaminated soil to a permitted disposal facility, for disposal within fifteen days of the order's issuance. After the issuance of the Final

Compliance Order, defendants proposed bioremediation instead of excavation, containerization, and disposal. The CDPHE rejected this proposal and continues to require excavation, containerization, and disposal of these contaminated soils stored in three separate waste piles.

On December 23, 1996, the CDPHE issued an Administrative Penalty Order assessing civil monetary penalties. Both the United States and defendants calculate the current penalty amount at approximately $1,875,000. Defendants did not appeal the Administrative Penalty Order and have not paid any portion of the assessed civil monetary penalties.

e. Estimated Costs of Remediation

As stated, federal and state regulations require hazardous waste facilities that treat, store, and dispose of hazardous waste to obtain a permit. When a facility, obtains a permit, the facility must submit remediation, closure, and post-closure plans, together with evidence of financial assurances that guarantee the availability of funds for remediation, closure, and post-closure care. The amount of financial assurances is based, in large part, on the remediation, closure, and post-closure plans.

Here, defendants illegally treated, stored, and disposed of hazardous waste without a permit or Interim Status. Because defendants did not seek a permit or Interim Status, they have evaded the normal approval process and the requirements for submission of a written remediation, closure, and post-closure plan. Significantly, defendants' omission evaded the critical requirement that they provide financial

assurances. Indeed, PEC has only recently implemented soil and groundwater characterization plans. PEC submitted a final site investigation report on May 11, 1998, the first day this hearing.

Neither the CDPHE, the EPA, or the defendants' experts have a complete understanding of the extent of contamination. Without that, the costs of remediation are difficult to estimate. Yet, even when a treatment, storage, or disposal facility formulates closure and post-closure plans early on pursuant to the permit process, the amount of financial assurances is based on conservative estimation of closure costs. Under these circumstances, I find that the absence of a closure plan and post-closure plan is not fatal to the United States' request for financial assurances. Given the experts' knowledge of the sources of contamination, the severity of the contaminant plume, and the known costs of certain remediation devices, I conclude that they are able to give reliable estimates of remediation costs.

Based on current estimates of contamination, the CDPHE estimates the cost to remediate the contaminated soil and groundwater at between $3,000,000 and $6,000,000. This estimate also includes costs of subsequent monitoring of groundwater and soil.

In 1997, PEC's counsel represented to counsel for the United States that remediation will cost $2,300,000. Further, Daniel Frieson ("Frieson"), PEC's controller, testified that he 'knew of estimates ranging from $2,500,000 to $5,000,000. The record, however, contains no explanation for the estimates of PEC's counsel and Frieson.

Galloway, defendants' hydrologist, testified that remediation of the groundwater could be achieved by installation of passive treatment walls. Passive treatment walls, utilized at other hexavalent chromium contamination sites, permit groundwater to flow through the wall. A chemical filtration reaction occurs as the groundwater flows through the wall. Galloway testified logically that proper remediation of the plume will require installation of passive treatment walls at two locations: (1) near the Facility; and (2) immediately before the plume's intersection with the South Platte river. Galloway estimates that installation of these passive treatment walls and subsequent monitoring will cost $1,200,000 for ten years. Galloway's estimate does not include remediation costs for contaminated soil.

Based on the direct and circumstantial evidence, I find that remediation of the soil and groundwater will cost approximately $3,500,000. Galloway's calculation of $1,200,000 is a credible estimate, but only includes groundwater remediation for a period of ten years. The CDPHE's estimate of $3,000,000 to $6,000,000 is not substantially different than PEC's estimates of $2,300,000 to $5,000,000. Accordingly, the United States' request for financial assurances in the amount of $3,500,000 is a fair estimate of the costs of remediation.

f. Ability of Defendants to Provide Financial Assurances

The United States requested that defendants provide financial assurances for the Facility by October 31, 1997. Defendants represented that they do not have sufficient assets to provide financial assurances. The evidence shows,

however, that defendants, collectively, have the financial ability to provide financial assurances in the amount of $3,500,000. Lilienthal stipulates that, as an "owner" and "operator" of the Facility as those terms are defined by 6 COLO. CODE REGS. 1007-3 § 261.10, he is subject to any mandatory injunctive order directing defendants to secure financial assurances. (Stip. ¶ 72.)

PEC is a viable, profitable company with a low debt-equity ratio and positive cash flow. In recent years, it has earned a return of 14% of its net worth. Beginning in 1992 and 1993, and coinciding with the CDPHE compliance investigation, PEC began to reduce its debt. PEC satisfied several obligations, including bank loans, lines of credit, and private loans owed to the Lilienthal Family Trust. PEC reduced its debt by $775,495 between November 30, 1991 and November 30, 1997. PEC prepaid many of these obligations. While reduction of debt is a prudent business practice under many circumstances, the evidence indicates that PEC's prepayment of loans significantly reduced its readily available cash. Prepayment also insulated Lilienthal from personal liability for such loans as a personal guarantor on all of the obligations. At Lilienthal's behest. PEC and Redoubt increased his salary and bonus to approximately $315,000 in 1997, a 200% increase since 1992. Lilienthal's salary increase further reduced the amount of cash available to PEC and Redoubt for remediation.

Despite this pattern of debt reduction, I find that PEC and Redoubt can contribute substantially to defendants' collective ability to provide financial assurances. PEC has a net book value of $2,000,000. Although the land may be worth little or nothing because of the contamination, it would

be worth between $3,000,000 and $5,000,000 once remediated. Further, Melinda Harper ("Harper"), an expert in accountancy whose testimony I find credible on this issue, testified that PEC and Redoubt have the ability to accumulate readily available cash in the amount of $800,000 over the next eight to ten months. Melinda Harper's estimate considers near term expenditures and does not appear to jeopardize PEC's earning capacity or ability, to pay operating costs. This $800,000 figure derives from the following sources: (1) currently available cash; (2) sale of UNUM stock worth approximately $500,000, in which PEC has zero tax basis; (3) decreasing Lilienthal's 1998 estimated salary and bonus by approximately 50%; and (3) securing a loan on officers' life insurance policies to obtain $48,000.

Lilienthal also has the ability to contribute substantially. Despite his testimony otherwise, the evidence shows that he is a sophisticated businessman. The transactions he engaged in over the last several years reflect a high degree of business acumen and awareness of pertinent issues. In general, I find Lilienthal's testimony lacking in credibility. Although Lilienthal testified that he has few assets and substantial liabilities, the evidence shows that Lilienthal has the ability to contribute assets worth approximately $1,400,000 towards financial assurances.

Lilienthal owns one-half interest in a Vail, Colorado duplex worth approximately $2,400,000. The co-owner of this property is Lilienthal's brother, Jack Lilienthal. In January 1996, Lilienthal attempted to transfer his one-half interest in the Vail duplex to his wife, Kathleen Linneman ("Linneman"), without consideration. Lilienthal, however, is precluded by agreement with Jack Lilienthal from transferring

his interest in the duplex to his wife until his transfer is likely void or voidable. Although Lilienthal delivered the quit claim deed to Linneman, he instructed Linneman not to record the deed until his death and she has not recorded the deed.

Lilienthal also owns one-half interest in a house in Belize worth approximately $230,000 and one-half interest in a house in Page, Arizona worth approximately $200,000. The house in Belize is unencumbered and the house in Page carries a $100,000 mortgage. Lilienthal's equity. in the Belize and Page properties is $165,000.

The evidence also reflects that Lilienthal has full use and enjoyment of three additional assets:

(1) In January 1996, Lilienthal transferred to Linneman his one-half interest in their Denver residence without consideration. This residence is worth approximately $300,000 and serves as the couple's primary, residence. Approximately five months after the purported transfer, Linneman obtained a $600,000 loan and pledged their Denver residence as collateral. The record does not disclose the purpose or application of the loan proceeds.

(2) Also in January 1996, with Lilienthal's assistance, Linneman acquired a house in Paradise Valley, Arizona at a cost of $1,325,000. Lilienthal conceded that he and Linneman occasionally stay at the Paradise Valley house.

(3) Lilienthal has a future property, interest in the Lilienthal Family Trust, a generation-skipping trust created by Lilienthal's deceased father. Upon his mother's death, Lilienthal and his brother are the co-beneficiaries of the trust. The record does not disclose the value of the trust.

Despite his divestiture or attempted divestiture in 1996 of the Vail duplex, the Denver residence, and the Paradise Valley house, Lilienthal continues to pay the mortgage payments, insurance payments, utility payments, and general maintenance costs for each property. Lilienthal testified that he divested or attempted to divest himself of the Vail duplex and the Denver residence in 1996 to preclude his daughter from inheriting these properties upon his death. Even assuming the truth of his professed motive, the affect of these transfers insulated his assets from creditors and decreased assets available for remediation.

The evidence thus shows that Lilienthal has current ownership and direct access to the Vail duplex and the houses in Belize and Page. The combined value is $1,365,000. Lilienthal can easily contribute another $35,000 from his PEC and Redoubt salaries or a private lender. Accordingly, I find that Lilienthal has the financial wherewithal to provide financial assurances in the amount of $1,400,000.

Based on the timing of these significant patterns of debt reduction and asset divestiture, I further find that defendants have deliberately attempted to evade or minimize the payment of environmental remediation, civil monetary penalties, and financial assurances. A significant burden

exists, however, in combination, to provide financial assurances and pay civil monetary penalties in the amount of $1,875,000 within the near term. By seeking an order requiting defendants to provide financial assurances in the amount of $3,500,000, the United States has prioritized financial assurances over the payment of civil monetary penalties. Given the demonstrated profitability of PEC, however, I see no reason why defendants cannot achieve remediation over a reasonable period of time, even after providing financial assurances.

I also find that defendants can obtain financial assurances at a reasonable market price. The testimony of both Harper and defendants' accounting expert, John Mahan ("Mahan"), indicates that defendants, collectively, could provide a trust fund, letter of credit, surety bond, insurance policy, or combination thereof, in the amount of $3,500,000. Both Harper and Mahan contacted insurers to ascertain the requirements for each mechanism.

During direct examination, Mahan testified about the complexity, cost, and inability, of defendants to obtain financial assurances for the full remediation and closure costs of the Facility. To establish a trust fund, defendants would have to provide or borrow assets equal to the amount of the trust fund. To obtain a letter of credit, surety bond, or insurance policy, defendants would have to provide security having a value equal to or nearly equal to the amount of the letter of credit, surety bond, or policy limit of the insurance policy. Because the exact costs of remediation and closure are unknown, Mahan testified that any potential lender would conservatively estimate the costs of remediation and closure, increasing the cost to defendants.

Mahan was not informed, however, that the United States seeks financial assurances in the fixed amount of $3,500,000. Once aware of this fact, Mahan conceded during cross-examination that defendants could provide financial assurances through a combination of acceptable mechanisms. Specifically, Mahan testified that available assets could be placed in a trust fund and the remaining amount could be provided by an insurance policy or bond. Mahan also testified that, if defendants are unable to pay the entire premium of an insurance policy or bond, defendants could borrow all or pan of the premium costs from a private lender. The reduction of Lilienthal's salary, and bonus by 50% could, alone, provide PEC with enough available future cash to finance the yearly interest cost of an insurance premium. Mahan's testimony comports with Harper's testimony that PEC is an insurable entity, given its profitability and assuming Lilienthal stands behind the company as a guarantor.

Accordingly, I find that defendants are capable of providing financial assurances. PEC's readily available cash of $800,000, when combined with Lilienthal's directly owned assets of $1,400,000, could be placed in a trust fund with a present value of $2,200,000. Defendants could borrow the remaining $1,300,000, obtaining an insurance policy for that fixed amount.

Lastly, the United States alleges that defendants' counsel threatened on three occasions that Lilienthal would abandon the Facility and move to Belize if the CDPHE continued to pressure defendants. I find that these threats were "posturing" by defense counsel and I am unable to conclude that Lilienthal intends to flee the United States in favor of a foreign county. I find, however, that defendants overtly

threatened to file bankruptcy and liquidate all assets if the federal and state governments continue to seek the Facility's compliance with federal and state hazardous waste regulations.

IV. CONCLUSIONS OF LAW

Defendants submit two legal arguments that require resolution before analysis of the equities. First, defendants argue that the Facility is currently operating in compliance with Colorado's regulations and, therefore, is exempt from financial assurance requirements. Second, defendants contend that the United States may not attempt to obtain financial assurances for past violations of Colorado regulations. I address each argument separately.

a. Current Noncompliance

Defendants first contend that the Facility is operating in compliance with Colorado's regulations, exempting the Facility from financial assurance requirements. I disagree. The evidence shows that the defendants currently dispose of hazardous waste without a permit or interim status and without providing financial assurances. The Facility is disposing hazardous waste in three distinct ways: (1) the Facility's air scrubbers dispose a mist of hexavalent chromium condensate onto Facility soil; (2) the Facility failed to remediate the soil contaminated by a yellow/orange liquid that leaked from air scrubbers down the west side of the Facility's main building; and (3) the Facility failed to remediate the three open waste piles of contaminated soil excavated from beneath the chrome-plating tanks and the remaining contaminated soil located beneath the chrome-plating tanks.

I discuss separately the legal justification for these conclusions of law.

1. Deposit of Hexavalent Chromium Condensate Mist onto the Soil

The Facility's air scrubbers currently dispose a mist of hexavalent chromium condensate mist onto Facility, soil. This disposal is a continuing violation that has occurred since the installation of the air scrubbers in the late 1970's. The soil contaminated by this disposal has not been remediated and is a likely source of groundwater contamination.

RCRA establishes a regulatory structure for the treatment, storage, and disposal of solid and hazardous wastes. Solid wastes are regulated pursuant to Subchapter IV, 42 U.S.C. §§ 6941-6949a. Hazardous wastes are subject to the more stringent standards of Subchapter III, § 42 U.S.C. § 6921- 6939b. Under RCRA, "hazardous wastes" are a subset of"solid wastes." *See* 42 U.S.C. § 6903(5). Accordingly, for a waste to be classified as hazardous, it must first qualify as a "solid waste." *See United States v. Self,* 2 F.3d 1071, 1076 (10th Cir. 1993) (citations omitted); *see also United Technologies Corp. v. EPA,* 821 F.2d 714, 716 n. 1 (D.C.Cir. 1987).

RCRA defines "hazardous waste," in relevant part, as:

> . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause, or significantly contribute to an increase in

> mortality or an increase in serious irreversible, or incapacitating reversible, illness. . . or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5); *see also* C.R.S. § 25-15-101(6) (identical definition). There is no dispute that hexavalent chromium is "hazardous" as defined by Colorado regulations. *See* 6 COLO. CODE REGS. 1007-3 § 261. The hexavalent chromium condensate, however, must also qualify as a "solid waste" to come within the regulatory sphere of RCRA.

RCRA defines "solid waste" to include "any . . . discarded material, including . . . liquid . . . material resulting from industrial . . . activities . . . ." "42 U.S.C. § 6903(27). Erzinger described the hexavalent chromium condensate expelled by the air scrubbers as a mist of "suspended liquid." This testimony is uncontroverted. Thus, the chromium condensate expelled by the air scrubbers is a liquid material resulting from industrial activity.

Colorado regulations narrow the definition of "solid waste" to "any discarded material that is not excluded by § 261.4(a) or that is not excluded by a variance granted under § 260.30 and § 260.31." 6 COLO. CODE REGS. 1007-3 § 261. Defendants do not contend that hexavalent chromium condensate is subject to the § 261.4(a) exclusion or that the condensate has been granted a variance under §§ 260.30 and 260.31. Thus, whether hexavalent chromium condensate is a solid waste turns on whether it is a "discarded material." *Self*, 2 F.3d at 1076.

The regulations define "discarded material" as material that is "[a]bandoned," "[r]ecycled," or "[c]onsidered inherently wastelike." 6 COLO. CODE REGS. 1007-3 § 261.2(a)(2). There is no evidence indicating that the Facility recycled the hexavalent chromium condensate or that the condensate satisfies the "inherently wastelike" criteria. Thus, the condensate must be "abandoned" to constitute solid waste. A material is "abandoned," inter alia, by being burned, incinerated, or "[d]isposed of." *Id. at* § 261.2 (b)(2). As noted by the Tenth Circuit, "[t]he determination of whether a material is a solid waste by virtue of being disposed of leads us in circles in that the statutory and regulatory, definitions of"disposal" depend in part on whether the material is a solid waste." *Self, 2* F.3d at 1077 n. 3 (citing 42 U.S.C. § 6903(3); 40 C.F.R. § 260.10; *Reading Co. v. City of Philadelphia,* 823 F. Supp. 1218, 1235-1237 (E.D.Pa. 1993); *Zands v. Nelson,* 779 F. Supp. 1254, 1261-1262 (S.D.Cal. 1991)). Despite this circuitous path, I must follow the plain and ordinary meaning of the regulations.

"Disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3); C.R.S. § 25-15-101(3); 6 COLO. CODE REGS. 1007-3 § 261.10. Here, the evidence demonstrates that the Facility's scrubbers currently deposit, and have deposited for several years, a mist or "suspended liquid" of hexavalent chromium condensate onto Facility land. Soil contamination extends approximately thirty, feet west from the scrubbers. (Exs. 18, 19.)

Defendants contend that, because the air scrubbers discharge the condensate into the air, the discharge does not constitute placement of solid waste "into or on any land or water." The evidence shows, however, that the air scrubbers discharge condensate only a few feet above the ground, and potentially only inches from the ground. (Exs. 6, 7.) Acceptance of defendants' overly narrow interpretation of the definition would exclude recognized acts of disposal, such as the dumping of waste by a dump-truck and the discharge of liquid waste by an effluent pipe situated several inches or feet above land, merely because the hazardous waste becomes airborne briefly before contacting the land. Though the definition of "disposal" is not limitless, its has broad scope. I hold that the discharge of hexavalent chromium condensate from the air scrubbers, which settles onto the Facility soil, satisfies the broad definition of "disposal." Accordingly, I find and conclude that the Facility is now disposing hexavalent chromium condensate. Because the Facility "disposes" the condensate, it constitutes "discarded material" and, therefore, "solid waste" as defined by Colorado regulations.

2. Continuing Disposal of Hexavalent Chromium by Defendants' Failure to Remediate the Soil Contaminated by Liquid that Leaked Down the Outside Western Wall from the Air Scrubbers

Defendants have not remediated the soil contaminated by the yellow/orange liquid that leaked from air scrubbers down the west side of the Facility's main building. Although PEC apparently repaired these leaks in 1994, liquid containing approximately 250,000 ppm of hexavalent chromium leaked into the soil for nearly two decades.

Defendants concede that the leaking of this liquid into the soil constituted "disposal" as that term is defined. Defendants argue, however, that because the leaks were repaired in 1994 and liquid no longer leaks down the wall into the soil, this disposal ceased. Indeed, unlike the ongoing discharge of hexavalent chromium condensate mist from the air scrubbers that continues to add hazardous waste to the soil, the leaks no longer add hazardous waste to the soil at the base of the west wall. Yet this soil remains in an unremediated state and is a probable source of groundwater contamination.

Courts have grappled with the issue whether the continued presence of an illegally disposed hazardous waste constitutes a continuing violation under the RCRA. The overwhelming majority have found continuing violations for substantive violations of the RCRA when the environmental harms caused by the violations are curable, even when the affirmative act that initiates the violation occurred on a single day. *See, e.g., In re Consolidated Land Disposal Regulation Litigation,* 938 F.2d 1386, 1388-1389 (D.C.Cir. 1991) ("disposal" is equated with "leaking," a "continuous phenomenon rather than a discrete event"); *Aurora Nat 'l Bank v. Tri Star Marketing, Inc.,* 990 F. Supp. 1020, 1025 (N.D.Ill. 1998); *City of Toledo v. Beazer Materials & Services, Inc.,* 833 F. Supp. 646, 656 (N.D.Ohio 1993) (disposal of wastes in violation of the RCRA can constitute a continuing violation for purposes of citizen suit as long as the waste has not been remediated and the environmental effects remain remediable); *Gache v. Town of Harrison, New York,* 813 F. Supp. 1037, 1041 (S.D.N.Y. 1993) ("The environmental harms do not stem from the act of dumping when waste materials slide off the dump truck but rather after

they land and begin to seep into the ground, contaminating the soil and water."); *Acme Printinging Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498, 1512 (E.D.Wis. 1992) ("RCRA includes in its broad definition of 'disposal' the continuous leaking of hazardous substances . . . . Accordingly, leaking of hazardous substances may constitute a continuous or intermittent violation of RCRA."); *Fallowfiled Development Corp. v. Stunk,* 1990 WL 52745 (E.D.Pa. 1990) (violation continues until proper disposal procedures are put into effect or the hazardous waste is remediated); *North Carolina Wildlife Federation v. Woodbury,* 29 E.R.C. 1941, 1989 WL, 106517 (E.D.NC. 1989) (same); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 200 (W.D.Mo. 1985) (RCRA could be applied to enjoin present leaking resulting from past disposal of hazardous waste in imminent hazard action), *overruled on other grounds, United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 741 (8th Cir. 1986): *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1400 (D.N.H. 1985) (same); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1435 (S.D.Ohio 1984) (same). *See also Acme Printing Ink Co. v. Menard, Inc.*, 891 F. Supp. 1289, 1301-1302 (E.D.Wis. 1995) (collecting cases); Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law,* 23 ECOLOGY L.Q. 723,737-741 (1994) (collecting and categorizing cases). *But see Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2d Cir. 1993) (lead shot and clay target debris previously deposited into Long Island Sound by trap and skeet shoot club, although decomposing and contaminating wildlife, did not constitute "present violation" of RCRA for purposes of citizen's suit under 42 U.S.C. § 6972(a)).

Because the definition of"disposal" includes the word "leaking," disposal occurs not only when a solid waste or a hazardous waste is first deposited onto ground or into water, but also when such wastes migrate from their initial disposal location. The soil contaminated by the yellow/orange liquid that leaked from air scrubbers down the west side of the Facility's main building remains. Tests conducted by Erzinger indicate that hexavalent chromium remains at the junction of the western wall and the land. Based on the testimony of Wireman and Galloway, one can reasonably infer that hexavalent chromium leaches into the groundwater from this source. Further, both Wireman and Galloway testified that these conditions are remediable. Accordingly, I conclude that the leaching of hazardous waste into the groundwater from this soil constitutes continuing disposal of hazardous waste.

3. Failure to Remediate the Three Open Waste Piles of Contaminated Soil Excavated from Beneath the Chrome Plating Tanks and the Soil Remaining Beneath the Plating Tanks

The same analysis applies to the three open waste piles of contaminated soil excavated from beneath the chrome-plating tanks and the contaminated soil located beneath the chrome-plating tanks. Although PEC installed additional containment systems to prevent discharges of hazardous waste into the soil beneath the plating tanks, hexavalent chromium likely remains beneath the plating tanks. This hexavalent chromium is a probable source of groundwater contamination. In this unremediated state, the contaminated soil constitutes disposal of hazardous waste.

The United States also contends that defendants' retention of the three open waste piles composed of contaminated soil excavated from beneath the plating tanks constitutes illegal "storage" of hazardous waste. Indeed, this waste is not stored in containers or properly labeled. (Ex. 7 (open waste pile covered with tarp and cinder blocks); Exs. 8-9 (open waste pile); Ex. 10 (open waste pile).) Further, this waste has accumulated for several years. While I hold, for the purposes of this motion, that this disposal of hazardous waste now occurs at the Facility, I cannot conclude that defendants currently store hazardous waste in violation of Colorado regulations.

"Storage" is defined as "the containment of hazardous waste, either on a temporary basis for a period of years, in such a manner as not to constitute disposal of such hazardous waste." 42 U.S.C. § 6903(33) (emphasis added); 6 COLO. CODE REGS. 1007-3 § 261.10 (identical definition). Defendants dumped the contaminated soil onto the land "so that such . . . hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters" and, hence, they engaged in "disposal." Because the dumping constitutes ongoing illegal disposal, and because the United States has stipulated that defendants' creation of the uncontained waste piles constituted "disposal" (Stip. ¶ 71), I conclude that no evidence exists of current illegal storage.

4. Conclusion Regarding Current Noncompliance

Colorado regulations define a "treatment, storage, or disposal site or facility" ("TSDF") as "a location at which hazardous waste is subjected to . . . disposal and may include

a facility where hazardous waste is generated." 6 COLO. CODE REGS. 1007-3 § 261.10. Because defendants currently dispose of hazardous waste at the Facility, they own and operate a TSDF. A generator of hazardous waste that treats, stores, or disposes of hazardous waste on-site must comply with § 262 (standards applicable to generators of hazardous waste), § 264 (standards for owners and operators of hazardous waste treatment, storage, and disposal facilities), § 265 (interim status standards for owners and operators of hazardous waste treatment, storage, and disposal facilities), and, critically, § 266 (Colorado financial assurance requirements). *See 6* COLO. CODE REGS. 1007-3 § 262.10 n. 2.

There is no dispute that PEC is the "operator" of the Facility within the meaning of 6 COLO. CODE REGS. 1007-3 § 261.10. PEC is and was a "generator" of hazardous waste as defined by 6 COLO. CODE REGS. 1007-3 § 261.10 and 40 C.F.R. § 260.10. (Stip. ¶¶ 15-16.) Redoubt is an "owner" of the Facility as that term is defined by 6 COLO. CODE REGS. 1007-3 § 261.10: (Stip. ¶ 14.) Lilienthal stipulates that, as an "owner" and "operator" of the Facility as those terms are defined by 6 COLO. CODE REGS. 1007-3 § 261.10, he is subject to any mandatory injunctive order directing defendants to secure financial assurances. (Stip. ¶ 72.) Because defendants currently own and operate a TSDF. Colorado regulations require them to provide financial assurances. Indeed, Colorado regulations require defendants to do much more than provide financial assurances, but these additional requirements are outside the scope of relief requested by the United States in this motion for preliminary, injunction.

b. Application of RCRA's Financial Assurance Requirements to Past Conduct

Defendants next argue that the United States may not obtain financial assurances for past violations of RCRA. (Defs.' Resp. to Plf.'s Mot. Prelim. Injunction at 12.) The premise for this argument is that the financial assurance requirements apply only prospectively and that the United States may not require financial assurances for past acts of disposal, even if such acts of disposal occurred after RCRA became effective. As discussed above, I conclude that defendants are operating a hazardous waste facility by virtue of three distinct types of current disposal, subjecting them to the financial assurance requirements. Even assuming defendants do not currently dispose of waste, I hold that the United States may require defendants to provide financial assurances for defendants' admitted prior acts of treatment, storage, and disposal of hazardous waste.

Initially, I note that defendants' argument does not invoke the issue of retroactivity. The admitted prior treatment, storage, and disposal of hazardous waste occurred after the effective dates of RCRA and its implementing regulations. The United States does not seek to impose liability for acts committed before RCRA's effective date. Defendants cannot and do not argue that they were given inadequate notice of prohibited conduct. Thus, I need not address retroactivity. *See, generally, Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994); *United States v. Rohm and Haas Co.*, 2 F.3d 1265, 1269 (3d Cir. 1993) (RCRA's permitting program is "prospective . . . [and] applies only to active . . . facilities and to . . . facilities closed after November 19, 1980"); *Interfaith Community Organization v.*

Allied Signal, Inc., 928 F. Supp. 133 9, 1349-1351 (D.N.J. 1996) (RCRA permit requirements do not apply to activities predating effective dare of RCRA); 53 Fed. Reg. 31,149 (August 17, 1988) ("only facilities where hazardous waste is intentionally placed into land or water after November 19, 1980 require RCRA disposal permits").

RCRA gives the EPA and, pursuant to 42 U.S.C. {} 6926(b), the State of Colorado, broad authority to regulate the disposal of hazardous waste. RCRA directs the establishment of "performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste . . . . " 42 U.S.C. § 6924(a). In establishing such standards, the EPA or State of Colorado:

> . . shall, where appropriate, distinguish in such standards between requirements appropriate for new facilities and for facilities in existence on the date of promulgation of such regulations. Such standards shall include, but need not be limited to, requirements respecting--. . . the maintenance of operation of such facilities and requiting such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility (including financial responsibility for corrective action) as may be necessary or desirable;. . . .

42 U.S.C. § 6924(a)(6). Thus, RCRA gives the EPA and State of Colorado broad authority to establish financial responsibility standards and does not preclude, expressly or impliedly, the requirement of financial assurances for past

conduct. A review of both federal and state regulations reflects that defendants are required to provide financial assurances for their past operation of a TSDF.

The federal regulations clearly require defendants to provide financial assurances. The financial responsibility requirements apply "to those owners and operators of facilities in existence on November 19, 1980 who have failed to provide timely notification as required by [42 U.S.C. § 6930(a)] and/or failed to file Part A of the permit application as required by 40 C.F.R. § 270.10(e) and (g)." 40 C.F.R. § 265.1(b) (emphasis added); *accord* 6 COLO. CODE REGS. 1007-3 § 265.1(b); *see also* 40 C.F.R. § 265.140. Section 265.1(b) requires "non-filers" or "non-notifiers" to comply with the financial responsibility requirements. It is undisputed that defendants, owners and operators of an existing hazardous waste facility in 1980, did not file a Part A permit application as required by 40 C.F.R. § 270.10(e) and (g). (Stip. ¶ 42.) Nor did defendants file a Part B application. (Stip. ¶ 42.) Thus, defendants were required to provide financial assurances in accordance with 40 C.F.R. § 265.1 (b) unless otherwise exempted. Defendants fail to argue that they were otherwise exempted by statute or regulation from providing financial assurances.

Colorado regulations impose liability for financial assurances upon "owners and operators of all hazardous waste facilities, ..." 6 COLO. CODE REGS. 1007-3 § 266.10(a); *see also* 6 COLO. CODE REGS. 1007-3 § 266.14 ("an owner or operator . . . must establish financial assurance for closure, and if applicable, post-closure of the facility"). Interpreted literally, this language does not restrict the applicability of the financial assurance requirements to past

conduct. As a matter of law, the conduct must have occurred after RCRA and its relevant implementing regulations became effective. *Rohm and Haas,* 2 F.3d at 1269. The time of the conduct, however, is not otherwise restricted by the literal language of Colorado's regulations.

Nothing within RCRA's "cradle-to-grave" regulatory scheme indicates that owners and operators of hazardous waste facilities are exempt from providing financial assurance requirements before remediation and closure is accomplished. To the contrary, the clear intent of federal and state regulations is for the financial assurance requirements to attach until remediation, closure, and, if necessary, post-closure care is assured. *See* 40 C.F.R. § 265. l(a) (standards for Interim Status facilities "define the acceptable management of hazardous waste during the period of interim status and until certification of final closure" (emphasis added)); *see also* 40 C.F.R. 265.1 (b) (Interim Status standards "apply . . . until either a permit is issued . . . or until applicable . . . closure and post-closure responsibilities are fulfilled); 6 COLO. CODE REGS. 1007-3 §§ 265.1(a) and (b).

Defendants' failure to disclose their treatment, storage, and disposal of hazardous waste does not now exempt them from the financial assurance requirements. The evidence shows that defendants were legally obligated to but did not file a permit application, seek interim status, or cease their activities of treatment, storage, and disposal. Like many of the facilities operating before and after RCRA's effective date, the Facility is now somewhere between the cradle and grave. The recent discovery of defendants' previous unauthorized activities does not, at this juncture, relieve them from their legal obligation to provide financial assurances. To

hold otherwise would be contrary to the expressed intent of Congress, the clear language of applicable regulations, and public policy. To reward defendants' past evasion of RCRA would encourage similar conduct by others.

Lastly, defendants contend that the financial assurance requirements are part of the integrated permit scheme and, therefore, a facility is not required to provide financial assurances unless it is also required to have a permit. Defendants stress that neither the CDPHE nor the EPA has requested that defendants obtain a permit for the operation of a TSDF. This argument, however, fails. While the defendants accurately note that a facility must provide financial assurances before a permit will issue, the financial assurance requirements attach regardless of whether a facility actually applies for a permit. 6 COLO. CODE REGS. 1007-3 §§ 266.10, 266.14. Indeed, the financial assurance requirements apply to unpermitted facilities. *Id.*

In summary, I conclude that defendants currently operate a TSDF without a permit or interim status and without providing financial assurances. I also conclude that, even if defendants did not currently operate a TSDF, they are required to provide financial assurances for past acts of treatment, storage, and disposal that occurred after RCRA, became effective. Thus, I next analyze the equities regarding the issuance of a mandatory injunction requiring defendants to provide financial assurances in the amount of $3,500,000.

c. Analysis of Equities

1. Irreparable Harm to Public Health or Environment

As the Supreme Court has warned, "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Production Co. v. Village of Gambell, Arkansas,* 480 U.S. 531, 545; *see also Catron County Bd. of Comm'rs, New Mexico v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996); *Citizens for Environmental Quality v. United States,* 731 F. Supp. 970, 996 (D.Colo. 1989). Here, however, the damage to the environment has occurred. Further, the damage continues. If an injunction does not issue, there is a substantial likelihood that the public health and environment will suffer ongoing irreparable harm. Without financial assurance, remediation of the Facility may never be accomplished or may be accomplished only with public funds. The United States cites defendants' repeated claims of limited financial resources and the stated intent to abandon the facility before remediation. Defendants have threatened bankruptcy. Defendants have also engaged in a pattern of debt reduction and divestment, decreasing available cash and jeopardizing their ability to pay for remediation.

Defendants respond that the public health and environment are better served by application of their limited financial resources to remediation rather than financial assurances. Defendants argue that financial assurance is not

the overriding purpose of RCRA. In support of this argument, they cite *United States v. Production Plated Plastics, Inc.*, 762 F. Supp. 722 (W.D.Mich. 1991). In *Production Plated Plastics*, the United States moved for preliminary injunctive relief, requesting that the court order the defendants to implement an approved closure plan and provide financial assurance for closure. Production Plated Plastics, Inc. ("PPP") began its operations in 1969. *Id* at 727. In 1980, PPP submitted a Part A application to achieve interim status. PPP, however, did not meet the financial responsibility requirements and lost its interim status on November 8, 1985. Despite losing its interim status, PPP continued its operations until 1987, discharging hazardous waste into unlined surface impoundments and operating waste piles. In 1988, PPP submitted a closure plan that estimated the cost of closure at $2,300,000. The Michigan Department of Natural Resources ("MDNR") approved the closure plan in 1988, but PPP failed to implement the approved plan. PPP submitted proposed amendments in 1989 which were not approved by the MDNR. *Id.*

After analyzing the equities, the court ordered the defendants to immediately implement the approved closure plan. The court found, however, little threat of irreparable harm from failure to provide immediate financial assurances. *Id.* at 732. As justification for its decision not to order the provision of financial assurances, the court stated that the order requiring the defendants to implement immediately the approved closure plan adequately protected the public's interest. *Id.*

Production Plated Plastics differs from the situation presented here. In *Production Plated Plastics*, the hazardous

waste facility had already ceased operating and an approved closure plan existed. Here, PEC continues to operate as a profitable enterprise. Further, no approved closure plan exists. Defendants have engaged in a pattern of debt reduction and asset divestiture, creating the reasonable inference that they seek to avoid payment of remediation costs and civil monetary penalties. Lastly, even if an approved closure plan existed, defendants have demonstrated their unwillingness and professed inability to implement an approved closure plan. For instance, the CDPHE approved a closure plan for the three open waste piles of soil excavated from beneath the plating tanks. Defendants, however, have not implemented the closure plan for these open waste piles. *Production Plated Plastics,* therefore, is factually distinguishable from this case.

Defendants next argue that injunctive relief is inappropriate because the United States has an adequate remedy at law, namely, the imposition of civil monetary penalties. *See Romero-Barcelo,* 456 U.S. at 312 ("The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.") Despite defendants' protestations to the contrary, the existence of an adequate legal remedy is not assured. First, an administrative penalty order was issued by the State of Colorado. Counsel for the State of Colorado represented during the hearing that the civil monetary penalty, if collected, would be deposited into the general fund for the State of Colorado, not applied directly to remediation. Plaintiff here is the United States, not the State of Colorado. If defendants abandon the facility or declare bankruptcy, the United States, pursuant to other environmental statues, may bear significant financial burden for remediation. Even assuming that the State of Colorado

will collect the civil monetary penalties from defendants, I am not persuaded that this provides adequate legal remedy to the United States. Second, civil monetary penalties of approximately $1,875,000 is substantially less than the expected costs of remediation. Accordingly, I conclude that no adequate legal remedy exists.

Because defendants concede multiple past violations of RCRA, have not commenced substantive remediation, ignored certain directives of the Final Compliance Order issued nearly two years ago, complain of limited financial resources, and threatened bankruptcy, there exists the threat that the public will have to subsidize remediation and proper closure of the Facility. I conclude, therefore, that the failure to provide immediate financial assurances would cause irreparable harm.

2. Balancing of Harms

This factor requires the balancing of the competing claims of injury and consideration of the effect on each party of the granting or withholding of the requested relief. *Citizens for Environmental Quality,* 731 F. Supp. at 996. To establish entitlement to a preliminary injunction, the United States must show that the potential injuries to the public health or environment outweigh the injury to the defendants. *Resolution Trust Corp. v. Cruce*. 972 F.2d 1195, 1200 (10th Cir. 1992).

Defendants contend they will suffer significant injury if an injunction mandating financial assurances issues. Defendants first argue that they have inadequate assets to provide financial assurances. As stated in the findings of fact, however, I conclude that defendants, collectively, have the

financial ability to provide financial assurances in the amount of $3,500,000.

Defendants next argue that they are unable, collectively, to provide financial assurances as well as pay civil monetary penalties. I agree. This is problematic because the evidence establishes that the defendants will be highly leveraged after providing financial assurances in the amount of $3,500,000. The EPA's decision to prioritize financial assurances, however, should not materially affect defendants's solvency. In any event, the extent to which defendants may be injured by providing financial assurances is less than the injury, to the United States, the public health, and the environment if an injunction does not issue. Indeed, because defendants began operating a treatment, storage, and disposal facility years ago, they should have already provided financial assurances. Defendants have operated, albeit illegally, with the financial advantage of not having established and maintained such assurances for several years.

3. Likelihood of Success on the Merits

If the United States sought a prohibitory injunction, it need only "raise questions going to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation, and thus for more deliberate investigation." *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172, 1180 (D.Kan. 1988). Because the United States seeks a mandatory injunction, however, it must show by compelling evidence that it will prevail on the merits. *George Washington Home Owners Ass'ns v. Widnall*, 863 F. Supp. 1423, 1426 (D.Colo. 1994).

In order to prevail on the merits, the United States must establish by compelling evidence that it is entitled to financial assurances. As discussed above, I hold that defendants are legally obligated to provide financial assurances because they currently operate a TSDF. Even if defendants did not currently operate a TSDF, they are required to provide financial assurances for their past acts of treatment, storage, and disposal of hazardous waste. I conclude, therefore, that the United States has shown likelihood of success on the merits by compelling evidence.

4. Public Interest

In considering the issuance of an injunction, the effect on the public of granting or withholding relief merits particular regard. *See Romero-Barcelo,* 456 U.S. at 312. There is no doubt here that issuance of an injunction would serve the public interest. Colorado citizens have a right to expect contamination-free groundwater and soils, a clean river, and a concerted, honest cleanup effort from a company that benefitted from multiple years in violation of RCRA. Denying the government's request for equitable relief, under these circumstances, would permit present harm to increase in scope and intensity and reward defendants for past omissions.

There is no question that the soil and groundwater contamination presents a current threat to the public and the environment. Ultimately, of course, the public will be served by proper remediation. Defendants, however, have failed to comply in good faith with the requirements of federal and state law for approximately two decades. Further, defendants' recent threats of bankruptcy and recent pattern of asset divestiture cause me to suspect their motives and intentions.

Under the circumstances of this case, it is necessary that financial assurances be provided. This is, after all, the order of process envisioned by RCRA. Requiring defendants to provide financial assurances may also ensure their good faith participation in the cleanup of contamination they have caused to their profit. Accordingly, I conclude that requiring defendants to provide financial assurances is not adverse to the public interest. Rather, such assurances clearly further the public interest.

5. Conclusion

For the reasons expressed above, the balance of the equitable factors tips heavily and compellingly in favor of the issuance of an injunction. Injunctive relief requiring defendants to provide financial assurances in accordance with 6 COLO. CODE. REGS. 1007-3 § 266 is appropriate in this case. The presence of substantially elevated levels of waste in the soil and groundwater at the site creates a reasonable concern for the public health and environment. Further, defendants' failure to implement complete remediation, failure to comply fully with the Final Compliance Order issued nearly two years ago, failure to pay assessed civil monetary penalties, complaints about financial limitations, and threats of filing bankruptcy disclose an unacceptable degree of risk relative to the "harm" to defendants will incur by providing financial assurance. As discussed above, the United States has demonstrated a substantial likelihood of success on the merits by compelling evidence. A balancing of the equities in this case weighs in favor of requiring defendants to provide with financial assurance requirements.

Accordingly I ORDER defendants PEC, Redoubt, and Richard Lilienthal to provide financial assurance in the amount of $3,500,000 pursuant to 6 COLO. CODE REGS. 1007-3 § 266 and all applicable subparts. Defendants shall so comply within thirty days or show good cause as to why they have not achieved such compliance.

Dated June 10, 1998.

BY THE COURT:

/s/_____
LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 97-B-1654

The undersigned certifies that a copy of the foregoing Memo, Opinion and Order was served on June 11, 1998, by:

(X) delivery to:

Linda Surbaugh
Assistant U. S. Attorney

Magistrate Judge O. Edward Schlatter

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

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APPENDIX E

PART 266 COLORADO FINANCIAL REQUIREMENTS

Subpart A - Financial Assurance

266.10 Applicability.
266.11 Definitions of terms as used in this subpart.
266.12 Cost estimate for facility closure.
266.13 Cost estimate for post-closure care.
266.14 Financial assurance for closure and/or post-closure
266.15 Use of a mechanism for financial assurance of both closure and post-closure care.
266.16 Liability requirements.
266.17 Incapacity of owners or operators, guarantors, or financial institutions.
266.18 Wording of the instruments.

§ 266.10 Applicability.

(a) The requirements of §§ 266.12, 266.14 and 266.16 through 266.17 apply to owners and operators of all hazardous waste facilities, except as provided otherwise in this section or in §§ 264.1 or 265. 1.

(b) The requirements of §§ 266.13 and 266.15 apply only to owners and operators of:

(1) Disposal facilities;

(2) Piles, and surface impoundments from which the owner or operator intends to remove the wastes at closure, to the extent that these sections are made applicable to such facilities in §§ 264.228 and 264.258, or §§ 265.228 and 265.258;

(3) Tank systems that are required under §§ 264.197 or 265.197 of these regulations to meet the requirements for landfills; and

(4) Containment buildings that are required under §§ 264.1102 or 265.1102 to meet the requirements for landfills.

(c) The State of Colorado and the Federal government are exempt from the requirements of Part 266 of these regulations.

(d) The Director may replace all or part of the requirements of this subpart applying to a regulated unit with alternative requirements for financial assurance set out in the permit or

in an enforceable document (as defined in § 100.10(d) of these regulations), where the Director:

(1) Prescribes alternative requirements for the regulated unit under § 264.90(f) or § 265.90(f) and/or § 264.110(c) or § 265.110(d); and

(2) Determines that it is not necessary to apply the requirements of this subpart because the alternative financial assurance requirements will protect human health and the environment.

(e) An attached statement of basis and purpose for these regulations has been adopted by the Board of Health and is hereby incorporated by reference in these regulations pursuant to C.R.S. 1988, 24-4-103.

§ 266.11 Definitions of terms as used in this Part.

(a) "Closure plan" means the plan for closure prepared in accordance with the requirements of §§ 264.112 and 265.112.

(b) "Current closure cost estimate" means the most recent of the estimates prepared in accordance with § 266.12.

(c) "Current post-closure cost estimate" means the most recent of the estimates prepared in accordance with § 266.13.

(d) "Parent corporation" means a corporation which directly owns at least 50 percent of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a 'subsidiary" of the parent corporation.

(e) "Post-closure plan" means the plan for post-closure care prepared in accordance with the requirements of §§ 264.117 through 264.120, and 265.117 through 265.120.

(f) The following terms are used in the specifications for the financial tests for closure, post-closure care, and liability coverage. The definitions are intended to assist in the understanding of these regulation and are not intended to limit the meanings of terms in a way that conflicts with generally accepted accounting practices.

"Assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity.

"Current assets" means cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

"Current liabilities" means obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

"Current plugging and abandonment cost estimate: means the most recent of the estimates prepared in accordance with 40 CFR § 144.62(a), (b), and (c).

"Independently audited" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

"Liabilities" means probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

"Net working capital" means current assets minus current liabilities.

"Net worth" recalls total assets minus total liabilities and is equivalent to owner's equity.

"Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and mi rights to patents or royalties.

(g) In the liability insurance requirements the terms "bodily injury" and "property damage" shall have the meanings given these terms by applicable State law. However, these terms do not include those liabilities which, consistent with standard industry practices, are excluded from coverage in liability policies for bodily injury and property damage. The Department intends the meanings of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The definitions given below of several of the terms are intended to assist in the understanding of these regulations and are not

intended to limit their meanings in a way that conflicts with general insurance industry usage.

"Accidental occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

"Legal defense costs" means any expenses that an insurer incurs in defending against claims of third patties brought under the terms and conditions of an insurance policy.

"Non-sudden accidental occurrence" means an occurrence which takes place over time and involves continuous or repeated exposure.

"Sudden accidental occurrence" means an occurrence which is not continuous or repeated in nature.

(h) Substantial business relationship" means the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A 'substantial business relationship" must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the Department.

§ 266.12 Cost Estimate for Closure.

(a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of closing the facility in accordance with the requirements in §§ 264.111 through 264.115 and §§ 265.111 through 265.115, and applicable closure requirements in §§ 264.178, 264.197, 265.197, 264.228, 265.228, 264.258, 265.258, 264.280, 265.280, 264.310, 265.310, 264.351, 265.351, 265.381, 265.404, 264.601 through 264.603, 264.1102, and 265.1102.

(1) The estimate must equal the cost of final closure at the point in the facility's active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan (See § 264.112(b) and § 265.112(b)); and

(2) The closure cost estimate must be based on the costs to the owner or operator of hiring a third party to close the facility. A third party is a party who is neither a parent nor a subsidiary of the owner or operator. (See definition of 'parent corporation' in § 266.11(d).) The owner or operator may use costs for on-site disposal if the owner or operator can demonstrate that on-site disposal capacity, will exist at all times over the life of the facility.

(3) The closure cost estimate may not incorporate any salvage value that may be realized with the sale of hazardous wastes or non-hazardous wastes if applicable under § 264.113(d) and § 265.113(d), facility structures or equipment, land, or other assets

associated with the facility at the time of partial or final closure.

(4) The owner or operator may not incorporate a zero cost for hazardous wastes, or non-hazardous wastes if applicable under § 264.113(d) and § 265.113(d), that might have an economic value.

(b) During the active life of the facility, the owner or operator must adjust the closure cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with § 266.14. For owners and operators using the financial test or guarantee, the closure cost estimate must be updated for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the Department as specified in § 266.14(i)(3). The adjustment may be made by recalculating the maximum costs of closure in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product as published by the U.S. Department of Commerce in its Survey of Current Businesses, as specified in paragraphs (b)(1) and (2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the closure cost estimate by the inflation factor. The result is the adjusted closure cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted closure cost estimate by the latest inflation factor.

(c) During the active lie of the facility, the owner or operator must revise the closure cost estimate no later than 30 days after the Department has approved the request to modify the closure plan, if the change in the closure plan increases the cost of closure. The revised closure cost estimate must be adjusted for inflation as specified in § 266.12(b).

(d) The owner or operator must keep the following at the facility during the operating life of the facility. The latest closure cost estimate prepared in accordance with § 266.12(a) and (c) and, when this estimate has been adjusted in accordance with § 266.12(b), the latest adjusted closure cost estimate.

§ 266.14 financial assurance for closure and/or post closure.

An owner or operator of each facility, by the effective date of these regulations, must establish financial assurance for closure, and if applicable, post-closure of the facility. He/she must choose from the options as specified in paragraph (a) though (i) of this section.

(a) Closure and/or Post Closure Trust Fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a closure and/or post-closure trust fund which conforms to the

requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Department within 30 days after the effective date of these regulations. An owner or operator of a new facility must submit the originally signed duplicate of the trust agreement to the Department at least 60 days before waste is first received for treatment, storage or disposal. The trustee must be an entity and which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(2) The wording of the trust agreement must be identical to the wording specified in § 266.18(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment § 266.18(a)(2). Schedule A of the trust agreement must be updated within 60 days after change in the amount of the current closure and/or post-closure cost estimate covered by the agreement.

(3) For a new facility, the trust fund must be fully funded by the owner or operator at least 60 days before waste is first received for treatment, storage, or disposal For existing interim status or permitted facilities, the trust must be fully funded by the owner or operator within 30 days of the effective date of these regulations.

(4) Whenever the current closure and/or post-closure cost estimate changes, the owner or operator must compare the new cost estimate with the trustee's most

recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure and/or post-closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(5) If the value of the trust fund is greater than the total amount of the current closure and/or post-closure cost estimate, the owner or operator may submit a written request to the Department for the release of the amount in excess of the current closure and/or post-closure cost estimate.

(6) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he/she may submit a written request to the Department for release of the amount in excess of the current closure and/or post-closure cost estimate covered by the trust fund.

(7) Within 60 days after receiving a request from the owner or operator for release of funds as specified in paragraphs (a)(5) or (6) of this section, the Department will instruct the trustee to release to the owner or operator such funds as the Department specifies in writing.

(8) Closure and post-closure care reimbursements.

(i) After beginning partial or final closure; an owner or operator or another person authorized to conduct partial or final closure may request reimbursements for partial or final closure expenditures by submitting itemized bills to the Department. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for partial or final closure activities the Department will instruct the trustee to make reimbursements in those amounts as the Department specifies in writing, if the Department determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Department has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, it may withhold reimbursements of such amounts as it deems prudent until it determines, in accordance with § 266.14(1) that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the Department does not instruct the trustee to make such reimbursements, it will provide the owner or operator with a detailed written statement of reasons.

(ii) During the period of post-closure care, the Department may approve a release of funds if the owner or operator demonstrates to the Department that the value of the trust fund exceeds the remaining cost of post-closure care.

(iii) An owner or operator or any other person authorized to conduct post-closure care may request reimbursements for post-closure care expenditures by submitting itemized bills to the Department. Within 60 days after receiving bills for post-closure care activities, the Department will instruct the trustee to make reimbursements in those amounts as the Department specifies in writing, if the Department determines that the post-closure care expenditures are in accordance with the approved post-closure plan or otherwise justified. If the Department does not instruct the trustee to make such reimbursements, it will provide the owner or operator with a detailed written statement of reasons.

(9) The Department will agree to termination of the trust when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Department releases the owner or operator from the requirements of this section in accordance with § 266.14(I).

(b) [Reserved]

(c) [Reserved]

(d) [Reserved]

(e) Closure and/or Post-Closure Letter of Credit.

(1) Ail owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this paragraph and submitting the letter to the Department within 30 days after the effective date of these regulations. An owner or operator of a new facility must submit the letter of credit to the Department at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal. The letter of credit must be effective before this initial receipt of hazardous waste. The issuing institution must have the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a Federal or State agency.

(2) The wording of the letter of credit must be identical to the wording specified in §266.18(e).

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section must also establish a standby trust fund, unless an alternate mechanism has been established by the State of Colorado to directly receive monies. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Department will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Department. This standby trust fund must meet the requirements of the trust fund specified in § 266.14(a) except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Department with letter of credit; and

(ii) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in § 266.14(a);

(B) Updating of Schedule A of the trust agreement [see § 266.18(a)] to show current closure and/or post-closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(4) The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: the EPA Identification Number, name, and address of the facility, and the amount of funds assured for closure and/or post-closure of the facility by the letter of credit.

(5) The letter of credit must be irrevocable and issued for a period of at least 1 year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least 1 year unless at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Department by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days will begin on the date when both the owner or operator and the Department have received the notice, as evidenced by the return receipts.

(6) The letter of credit must be issued in an amount at least equal to the current closure and/or post-closure cost estimate, except as provided in § 266.14(j).

(7) Whenever the current closure and/or post-closure cost estimate increases to an amount greater than the amount of the credit, the owner or operator, within 60 days after the increase, must either cause the amount of the credit to be increased so that it at least equals the current closure and/or post-closure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure and/or post-closure cost estimate decreases, the amount of the credit may be reduced to the amount of the current closure and/or post-closure cost estimate following written approval by the Department.

(8) During the period of post-closure care, the Department may approve a decrease in the amount of the letter of credit if the owner or operator demonstrates to the Department that the amount exceeds the remaining cost of post-closure.

(9) Following a final administrative determination pursuant to CRS 1973, 25-15-301 et seq. that the owner or operator has failed to perform final closure or post-closure in accordance with the closure or post-closure plan and other permit requirements when required to do so, the Department may draw on the letter of credit.

(10) If the owner or operator does not establish alternate financial assurance as specified and obtain written approval of such alternate assurance from the Department within 90 days after receipt by both the owner or operator and the Department of a notice from issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Department will draw on the letter of credit. The Department may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension the Department will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the Department.

(11) The Department will return the letter of credit to the issuing institution for termination when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Department releases the owner or operator from the requirements of this section in accordance with § 266.14(1).

(f) Surety Bond Guaranteeing Payment into a Closure and/or Post Closure Trust Fund.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this paragraph and submitting the bond to the Department within 30 days after the effective date of these regulations. An owner or operator of a new facility must submit the bond to the Department at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal. The bond must be effective before this initial receipt of hazardous waste. The surety company issuing the bond and any co-sureties must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury. If the surety is using reinsurance, a Treasury reinsurance form must be submitted with the bond or within 45 days thereafter. If co-sureties are being used, the original bond must reflect that fact.

(2) The wording of the surety bond must be identical to the wording specified in § 266.18(f).

(3) The owner or operator who uses a surety bond to satisfy the requirements of this section must also establish a standby trust fund, unless there has been an alternate mechanism established by the State of Colorado to directly receive monies. Under the terms of the bond,

all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with the instructions from the Department. This standby trust fund must meet the requirements specified in § 266.14(a), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Department with the surety bond; and

(ii) Until the standby trust is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in § 266.14(a);

(B) Updating of Schedule A of the trust agreement [see § 266.18(a)] to show current closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(4) The bond must guarantee that the owner or operator will:

(i) Fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or

(ii) Fund the standby trust fund in an amount equal to the penal sum within 15 days after an order to begin closure is issued by the Department or State court or other court of competent jurisdiction; or

(iii) Provide alternate financial assurance as specified in this section, and obtain the Department's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the Department of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(6) The penal sum of the bond must be in an amount at least equal to the current closure

and/or post-closure cost estimate, except as provided in § 266.14.(j).

(7) Whenever the current closure and/or post closure cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current closure and/or post-closure cost estimate and submit evidence of such increase to the Department or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure and/or post-closure cost estimate decreases, the penal sum may be reduced to the amount of the current closure and/or post-closure cost estimate following written approval by the Department.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Department. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department, as evidence by the return receipts.

(9) The owner or operator may cancel the bond if the Department has given prior written

consent based on it's receipt of evidence of alternate financial assurance as specified in this section.

(g) Surety bond guaranteeing performance of closure and/or post-closure.

(APPLICABLE TO PART B PERMITTED FACILITIES ONLY)

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this paragraph and submitting the bond to the Department. An owner or operator of a new facility must submit the bond to the Department at least 60 days before the date on which hazardous waste is first received for disposal. The bond must be effective before this initial receipt of hazardous waste. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) The wording of the surety bond must be identical to the wording specified in § 266.15(g).

(3) The owner or operator who uses a surety bond to satisfy the requirements of the section

must also establish a standby trust fund, unless an alternate mechanism has been established by the State of Colorado to directly receive monies. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into this standby trust fund in accordance with instructions from the Department. This trust fund must meet the requirements specified in § 266.15, except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Department with the surety bond; and bond; and

(ii) Unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in § 266.15;

(B) Updating of Schedule A of the trust agreement (sec § 266.18(a)) to show current post-closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(4) The bond must guarantee that the owner or operator will:

(i) Perform closure and/or post-closure care in accordance with the closure and/or post-closure plan and other requirements of the permit for the facility, or

(ii) Provide alternate financial assurance as specified in this section, and obtain the Department's written approval of the assurance provided, within 90 days of receipt by both the owner or operator and the Department of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. Following a final administrative determination pursuant to CRS 1973, 25-15-301 et seq. that the owner or operator has failed to perform closure and/or post-closure care in accordance with closure and/or post-closure plan and other permit requirements when required to do so, under the terms of the bond the surety will perform final closure and/or post-closure as guaranteed by the bond or will deposit the amount of the penal sum into the standby trust fund.

(6) The penal sum of the bond must be in an amount at least equal to the current closure and/or post-closure cost estimate.

(7) Whenever the current closure and/or post-closure cost estimate increases to an amount greater than the penal sum, within 60 days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current closure and/or post-closure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section. Whenever the current closure and/or post-closure cost estimate decreases, the penal sum may be reduced to the amount of the current closure and/or post closure cost estimate following written approval by the Department.

(8) During the period of closure and/or post-closure care, the Department may approve a decrease in the penal sum if the owner or operator demonstrates to the Department that the amount exceeds the remaining cost of closure and/or post-closure care.

(9) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Department. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department, as evidenced by the return receipts.

(10) The owner or operator may cancel the bond if the Department has given prior written consent. The Department will provide such written consent when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Department releases the owner or operator from the requirements of this section in accordance with § 266.14(1).

(11) The surety will not be liable for deficiencies in the performance of closure and/or post-closure care by the owner or operator after the Department releases the owner or operator from the requirements of this section in accordance with § 266.14(1).

(h) Closure and/or Post Closure Insurance.

(1) An owner or operator may satisfy the requirements of this section by obtaining closure and/or post-closure insurance which conforms to the requirements of this paragraph and submitting a certificate of such insurance to the Department within 30 days after the effective date of these regulations. An owner or operator of a new facility must submit the certificate of insurance to the Department at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal. The insurance must be effective before this initial receipt of hazardous waste. At a minimum, the insurer must be licensed to transact the business of insurance or be eligible to provide insurance as an excess or surplus lines insurer in one or more states and comply with the Title 10 Insurance Code, C.R.S., as amended.

(2) The wording of the certificate of insurance must be identical to the wording specified in § 266.18(h).

(3) The closure and/or post-closure insurance policy must be issued for a face amount at least equal to the current closure and/or post-closure cost estimate, except as provided in § 266.14(j). The term 'face amount' means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

(4) The closure and/or post-closure insurance policy must guarantee that funds will be available to close or provide post-closure care of the facility whenever final closure and/or post-closure occurs. The policy must also guarantee that once final closure and/or post-closure begins, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the Department, to such party or parties as the Department specifies.

(5) Closure and post-closure care reimbursements.

(i) After beginning partial or final closure, an owner or operator or

another person authorized to perform closure may request reimbursements for closure expenditures by submitting itemized bills to the Department. The owner or operator may request reimbursements for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of dosing the facility over its remaining operating life. Within 60 days after receiving bills for closure activities, the Department will instruct the insurer to make reimbursements in such amounts as the Department specifies in writing if the Department determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Department has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the face amount of the policy, it may withhold reimbursements of such amounts as it deems prudent until it determines, in accordance with § 266.14(1), that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the Department does not instruct the insurer to make such reimbursements, it will provide the

owner or operator with a detailed written statement of reasons.

(ii) An owner or operator or any other person authorized to conduct post-closure care may request reimbursements for post-closure care expenditures by submitting itemized bills to the Department. Within 60 days after receiving bills for post-closure care activities, the Department will instruct the insurer to make reimbursements in those amounts as the Department specifics in writing, if the Department determines that the post-closure care expenditures are in accordance with the approval post-closure plan or otherwise justified. If the Department does not instruct the insurer to make such reimbursements, it will provide the owner or operator with a detailed written statement of reasons.

(6) The owner or operator must maintain the policy in full force and effect until the Department consents to termination of the policy by the owner or operator as specified in paragraph (h)(ll) of this section. Failure to pay the premium, without substitution of alternate financial assurance as specified in this section, will constitute a violation of these regulations,

warranting such remedy as the Department deems necessary. Such violation will be deemed to begin upon receipt by the Department of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.

(7) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(8) The policy, must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the Department. Cancellation, termination, or failure to renew may not occur, however, during the 120 days beginning with the date of receipt of the notice by both the Department and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy

will remain in full force and effect in the event that on or before the date of expiration:

(i) The Department deems the facility, abandoned; or

(ii) The permit is terminated or revoked or a new permit is denied; or

(iii) Closure is ordered by the Department or a State or other court of competent jurisdiction; or

(iv) The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11(Bankruptcy), US Code; or

(v) The premium due is paid.

(9) Whenever the current closure and/or post-closure cost estimate increases to an amount greater that the face amount of the policy, the owner or operator, within 60 days after the increase, must either cause the face amount to be increased to an amount at least equal to the current closure and/or post-closure cost estimate and submit evidence of such increase to the Department, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure and/or post-closure cost estimate decreases,

the face amount may be reduced to the amount of the current closure and/or post-closure cost estimate following written approval by the Department.

(10) Commencing on the date that liability to make payments pursuant to the post-closure insurance policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to 85 percent of the most recent investment rate or of the equivalent coupon-issue yield announced by the U.S. Treasury for 26-week Treasury securities.

(11) The Department will give written consent to the owner or operator that he/she may terminate the insurance policy when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Department releases the owner or operator from the requirements of this section in accordance with § 266.14(1).

(i) Financial Test and Guarantee for Closure and/or Post Closure.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he/she passes a financial test as specified in this paragraph. To pass this test the owner or operator must meet the criteria of either paragraph (i)(1)(i) or (i)(1)(ii) of this section:

(i) The owner or operator must have:

(A) Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1: and a ratio of current assets to current liabilities greater than 1.5; and

(B) Net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates; and

(C) Tenable net worth of at least $10 million; and

(D) Assets located in the United States amounting to at least 90 percent of

total assets or at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates.

(ii) The owner or operator must have a current senior debt rating of AAA, AA, or A as issued by Standard and Poor's or Aaa, Aa, or A as issued by Moody's. Senior debt includes bonds, notes and debentures.

(2) The phrase 'current closure and post-closure cost estimates" as used in paragraph (i)(1) of this section refers to the cost estimates required to be shown in paragraphs 5-8 of the letter from the owner's or operator's chief financial officer (§ 266.18(i)). The phrase 'current plugging and abandonment cost estimates' as used in paragraph (i)(1) of this section refers to the cost estimates required to be shown in paragraphs 5-8 of the letter from the owner's or operator's chief financial officer (40 CFR § 144.70(f)).

(3) To demonstrate that he/she meets this test, the owner or operator must submit the following items to the Department:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in § 266.18(i);

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year, and

(iii) If the criteria of § 266.14(i)(1)(i) is used, a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) He/she has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) In connection with that procedure, no matters came to his/her attention which caused him/her to believe that the specified data should be adjusted.

(iv) Companies not required to submit audited financial statements to the U.S. Securities and Exchange Commission must have the auditors

opinion prepared by an auditor licensed in the State of Colorado.

(4) An owner or operator of a new facility must submit the items specified in paragraph (i) of this section to the Department at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal

(5) After the initial submission of items specified in paragraph (i) of this section, the owner or operator must send updated information to the Department within 90 days after the dose of each succeeding fiscal year. This information must consist of all three items specified in paragraph (i) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (i)(1) of this action, he/she must send notice to the Department of intent to establish alternate financial assurance as specified in this section. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator must provide the alternate financial assurance within 120 days after the end of such fiscal year.

(7) The Department may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (i)(1) of this section, require reports of financial condition at any time from

the owner or operator in addition to those specified in paragraph (i)(3) of this section. If the Department finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (i)(1) of this section, the owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of such a finding.

(8) The Department may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in the accountant's report on examination of the owner's or operator's financial statements [see paragraph (i)(3)(ii) of this section]. The Department will evaluate other qualifications on an individual basis. The owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

(9) During the period of post-closure care, the Department may approve a decrease in the current post-closure cost estimate for which this test demonstrates assurance if the owner or operator demonstrates to the Department that the amount of the cost estimate exceeds the remaining cost of post-closure care.

(10) The owner or operator is no longer required to submit the items specified in paragraph (i)(3) of this section when:

(i) Aa owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Department releases the owner or operator from the requirements of this section in accordance with § 266.14(1).

(11) An owner or operator may meet the requirements for this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a 'substantial business relationship' with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraph (i)(1) through (i)(8) of the section and must comply with the terms of the guarantee. The wording of the guarantee must be identical to the wording specified in § 266.18(j). A certified copy of the guarantee must accompany the items sent to the Department as specified in paragraph (i)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a 'substantial business relationship' with the owner or operator, this letter must describe this 'substantial business relationship' and the value received in consideration of

the guarantee. The terms of the guarantee must provide that:

(i) If the owner or operator fails to perform final closure and/or post-closure care of a facility covered by the guarantee in accordance with the closure plan and other permit requirements whenever required to do so, the guarantor will do so or establish a trust fund as specified in § 266.14(a) in the name of the owner or operator.

(ii) The guarantee will remain in form unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Department. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department, as evidenced by the return receipts.

(iii) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the Department within 90 days after receipt by both the owner or operator and the Department of a notice of cancellation of the guarantee from the guarantor, the guarantor will provide such alternative financial assurance in the name of the Owner or operator.

(12) If the Department has subscribed to an automated system containing audited financial data on the owner or operator, the owner or operator will only be required to submit a closure and/or post-closure cost estimate. Passage of the financial test will then be determined by the Department.

(j) Use of Multiple Financial Mechanisms.

An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. These mechanisms are trust funds, letters of credit, surety bonds guaranteeing payment into a trust fund, surety bond guaranteeing performance, insurance, financial test, and guarantee. The mechanisms must be as specified in paragraphs (a), (e), (f), (g), (h), and (i), respectively, of this section, except that it is the combination of mechanisms, rather than the single mechanism; which must provide financial assurance for an mount at least equal to the current closure or post-closure cost estimates. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, the owner or operator may use the trim fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The Department may use any or all of the mechanisms to provide for closure and/or post-closure care of the facility.

(k) Use of a Financial Mechanism for Multiple Facilities.

An owner or operator may use a financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility. Evidence of financial assurance submitted to the Department must include a list showing, for each facility, the EPA Identification Number, name, address, and the amount of funds for closure and/or post-closure assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure and/or post-closure of any of the facilities covered by the mechanism, the Department may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(l) Release of the Owner or Operator from the Requirements of this Section.

(1) Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan; the Department will notify the owner or operator in writing that the owner or operator

is no longer required by this section to maintain financial assurance for final closure of the facility, unless the Department has reason to believe that final closure has not been in accordance with the approved closure plan. The Department shall provide the owner or operator with a detailed written statement of any such reason to believe that closure has not been in accordance with the approved closure plan.

(2) Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that the post-closure care period has been completed for a hazardous waste disposal unit in accordance with the approved post-closure plan or permit, the Department will notify the owner or operator in writing that the owner or operator is no longer required by this section to maintain financial assurance for post-closure care of that unit, unless the Department has reason to believe that post-closure care has not been in accordance with the approved post-closure plan or permit. The Department shall provide the owner or operator with a detailed written statement of any such reason to believe that post-closure care has not been in accordance with the approved post-closure plan or post-closure permit.

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No. 99-1179

In the Supreme Court of the United States

POWER ENGINEERING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in issuing a preliminary injunction pursuant to Section 3008(a) of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6928(a), requiring petitioners to provide financial assurances for proper closure and post closure care of their hazardous waste facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 191 F.3d 1224. The opinion of the district court (Pet. App. 75a-126a) is reported at 10 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1999. The petition for a writ of certiorari was filed on December 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Resource Conservation Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, establishes a regulatory structure governing all aspects of hazardous waste management. 42 U.S.C. 6921-6939e (1994 & Supp. III 1997). One provision of the Act directs the Administrator of the Environmental Protection Agency (EPA) to establish "performance standards" for owners and operators of hazardous waste facilities. 42 U.S.C. 6924(a). The Act specifically identifies "financial responsibility (including financial responsibility for corrective action)," *ibid.*, as an area that EPA's performance standards should address.

If authorized by EPA, a State may carry out its own hazardous waste program in lieu of the federal program. 42 U.S.C. 6926(b). EPA has authorized Colorado to administer its own program, and as a result, the authorized Colorado regulations supplant federal regulations as requirements of RCRA. Pet. App. 12a & n.6. Under Colorado's authorized regulations, owners and operators of all hazardous waste facilities must comply with certain financial assurance requirements. 6 Colo. Code Regs. § 266.10 (1984) (CCR). Specifically, they must demonstrate that they have sufficient assets to provide for appropriate closure and post-closure care of their facilities, including required corrective action. CCR §§ 266.12, 266.13, 266.14. While the State has authority to enforce its regulatory requirements, EPA has independent authority under RCRA to enforce the authorized state requirements. 42 U.S.C. 6928, 6934, 6973. When EPA determines that a violation has occurred, it may file suit in "the United States district court in the district in which the violation occurred for

appropriate relief, including a temporary or permanent injunction." 42 U.S.C. 6928(a).

2. Since 1968, petitioners Power Engineering Company, Redoubt, Ltd., and Richard Lilienthal (the President of Power Engineering and the majority shareholder of both companies) have operated a metal finishing business in Denver, Colorado. Pet. App. 8a. Petitioners' operations generate thirteen waste streams and produce more than 1000 kilograms per month of hazardous waste, including arsenic, lead, mercury, and hexavalent chromium. Petitioners also store more than 6000 kilograms of hazardous waste per month at their facility. *Id.* at 9a.

In 1992, the Colorado Department of Public Health and the Environment (CDPHE) received a report that there were high levels of hexavalent chromium contamination of the surface water of the Lower South Platte River that could be traced to discharges from petitioners' facility. Pet. App. 9a. After learning of that contamination, CDPHE inspected petitioners' facility in August and September of 1992 and February and March of 1993. *Id.* at 9a-10a. The inspections revealed that petitioners were engaged in the unlawful treatment, storage, and disposal of hazardous waste. *Ibid.* As a result of petitioners' illegal activities, groundwater at, under, and near the facility is contaminated with levels of hexavalent chromium greatly exceeding established toxicity levels. *Ibid.* A plume of chromium contamination extends from petitioners' facility approximately 3310 feet into the South Platte Valley Fill Aquifer, which is connected to the South Platte River. *Id.* at 10a.

The CDPHE ordered petitioners to comply with certain requirements and assessed civil penalties. Pet. App. 10a. Petitioners complied with some parts of the

order, but not others, and they did not pay any portion of the civil penalty. *Ibid.* Petitioners have threatened to declare bankruptcy or abandon their facility rather than comply with their legal obligations. *Id.* at 20a, 122a. Petitioners have also engaged in a pattern of debt reduction and asset divestiture. *Id.* at 20a.

3. Dissatisfied with the lack of compliance by petitioners, the United States filed suit on behalf of EPA against them. Pet. App. 75a-76a. The United States' complaint alleged that petitioners violated RCRA by: (1) illegally treating, storing, and disposing of hazardous waste without a permit or interim status; (2) illegally shipping hazardous waste to a facility without a permit; (3) engaging in improper container management; (4) failing to provide employee training and failing to have a hazardous waste contingency plan; and (5) illegally operating a hazardous waste facility by failing to have a groundwater monitoring program, failing to minimize releases of hazardous waste, and failing to obtain and provide financial assurances. *Id.* at 76a. The United States sought a preliminary injunction under 42 U.S.C. 6928(a) directing petitioners to comply with the authorized state regulations governing financial responsibility and assurances.

After a hearing, the district court issued a preliminary injunction requiring petitioners to comply with the State's authorized financial responsibility requirements. Pet. App. 75a-128a. The court first held that petitioners own and operate a hazardous waste facility and are therefore subject to the State's authorized financial assurance requirements. *Id.* at 113a-118a. The court rejected petitioners' contention that the financial assurance requirements apply only to facilities that seek a permit. *Id.* at 118a. The court explained that "[w]hile [petitioners] accurately note that a facility

must provide financial assurances before a permit will issue, the financial assurance requirements attach regardless of whether a facility actually applies for a permit." *Ibid.*

The district court then ruled that the United States had established the prerequisites for obtaining a preliminary injunction. Pet. App. 119a-125a. The court specifically found that the United States had demonstrated "a substantial likelihood of success on the merits by compelling evidence" and that "a balancing of the equities" weighed in favor of requiring petitioners to comply with the financial assurance requirements. *Id.* at 125a. Finding that the amount of financial assurances required by RCRA is tied to the costs of remediation, *id.* at 95a, and that the costs associated with closure and post-closure care, including necessary remediation of the contaminated soil and groundwater at and near petitioners' facility, will be approximately $3.5 million, *id.* at 97a, the district court ordered petitioners to provide financial assurances in the amount of $3.5 million, *id.* at 126a.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court first rejected petitioners' contention that the United States does not have authority to seek compliance with the financial assurance requirements independently of seeking compliance with the entire permitting scheme. *Id.* at 16a-17a. The court explained that EPA has authority under RCRA to seek a temporary or permanent injunction for a violation of "any" requirement, 42 U.S.C. 6928(a), and that the financial assurance requirements apply to owners and operators of "all hazardous waste facilities," 6 CCR § 266.10(a), not just those that have sought or have obtained a permit. Pet. App. 17-18a.

The court of appeals also rejected petitioners' argument that the district court's preliminary injunction was designed to obtain prejudgment security to enforce any future judgment, in excess of the district court's authority under Fed. R. Civ. P. 64. Pet. App. 18a-20a. The court noted that the district court had expressly directed petitioners "to provide financial assurances in accordance with" the State's authorized financial assurance requirements, indicating that "the requested assurances will be used for closure and post-closure costs." *Id.* at 20a. The court also rejected petitioners' contention that the district court's reliance on the costs of remediation as the basis for the amount of financial assurances showed that the district court was actually attempting to obtain prejudgment security to enforce a later remediation order. The court explained that the district court had properly associated the costs of remediation with closure and post-closure of the facility. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 7-10) that the district court lacked authority to issue a preliminary injunction requiring them to provide financial assurances for closure and post-closure activities. That contention is without merit and does not warrant further review.

RCRA authorizes EPA to commence a civil action "for appropriate relief, including a temporary or permanent injunction" for a violation of "any" RCRA requirement. 42 U.S.C. 6928(a)(1). The State's federally-authorized financial assurance standards are among the requirements that EPA may enforce. 42 U.S.C. 6924(t), 6926(b) and (d). Thus, as the court of appeals concluded, the United States had authority to seek, and the district court had authority to grant, a preliminary in-

junction requiring petitioners to comply with RCRA's financial assurance requirements.

Petitioners contend (Pet. 7 & n.2) that the obligation to provide financial assurances arises only in the context of an application for a permit. Since they have never sought a permit, petitioners argue, the district court lacked authority to order them to provide financial assurances. Petitioners' admitted failure to establish and maintain financial assurances, however, is an independent, free-standing violation of the authorized financial assurance requirements. As the court of appeals explained:

> Colorado's financial assurance requirements "apply to owners and operators of *all* hazardous waste facilities," and *inter alia* require "[a]n owner or operator of each facility . . . [to] establish financial assurances for closure, and if applicable, post-closure of the facility." C.C.R. §§ 266.10(a) & 266.14 (emphasis added). By their terms, these regulations apply to all owners and operators of hazardous waste facilities; they are not limited to permit holders or applicants.

Pet. App. 17a; see also *United States* v. *Ekco Housewares, Inc.*, 62 F.3d 806, 809, 812 (6th Cir. 1995) (facility is subject to RCRA regulations for financial assurance until final closure is certified even though facility never obtained interim status by applying for permit). The district court therefore had authority to order petitioners to provide financial assurances. Petitioners' failure to seek a permit as required by RCRA did not affect that authority.

Petitioners further contend (Pet. 8-9) that the district court premised its preliminary injunction on a finding that petitioners had illegally treated, stored, and dis-

posed of hazardous waste without a permit or interim status required by RCRA, and that an order directing petitioners to provide financial assurances exceeds the scope of that violation. The district court, however, premised its preliminary injunction on a finding that petitioners had failed to comply with the State's financial assurance requirements. Pet. App. 118a, 123a-124a. The preliminary injunction is precisely tailored to remedy that violation.

Petitioners also contend (Pet. 8-9) that the district court lacked authority to require financial assurances, because RCRA does not authorize a court to award prejudgment security for the costs of a judgment except as authorized by Rule 64 and the district court's order goes beyond the prejudgment security remedies that are authorized under Rule 64. The fallacy in petitioners' argument is that the district court did not award prejudgment security for the costs of a later judgment; it issued a preliminary injunction requiring petitioners to comply with their obligation under RCRA to provide financial assurances for closure and post-closure activities. Pet. App. 126a. That remedy is expressly authorized by RCRA. See 42 U.S.C. 6928(a). For similar reasons, the limitations set forth in the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, have no application here. The United States is not seeking to collect on a debt; it is seeking to enforce petitioners' statutory obligation to provide the financial assurances necessary for their closure and post-closure activities.

Petitioners finally contend (Pet. 10-12) that the district court actually ordered prejudgment security, rather than compliance with RCRA's financial assurance requirements. That interpretation of the district court's order is incorrect. The district court ordered

petitioners "to provide financial assurance in the amount of $3,500,000 pursuant to 6 [CCR] § 266 and all applicable subparts." Pet. App. 126a. As the court of appeals explained, the plain terms of the order show that "the required assurances will be used for closure and post-closure costs." *Id.* at 20a. Nor does the district court's reliance (*id.* at 119a, 121a-122a) on petitioners' prior violations, their failure to comply with state remediation orders, their failure to pay civil penalties, their pattern of debt reduction and asset divestiture, and their threatened bankruptcy show that the district court intended for the money to be used to pay for the costs of the judgment rather than for closure and post-closure activities. The costs of closure and post-closure include the costs of remediation. As the court of appeals explained, "the district court properly considered remediation costs for the present contamination in calculating costs associated with financial assurances necessary, for the facility's closure or post-closure." *Id.* at 20a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-1179

IN THE
SUPREME COURT OF THE UNITED STATES

POWER ENGINEERING COMPANY,
REDOUBT, LTD., and RICHARD J. LILIENTHAL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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SUMMARY OF ARGUMENT

Elemental principles of statutory instruction issued by this Court prohibit the use of financial assurances described in 6 C.C.R. 1007-3, Part 266 as a substitute for the prejudgment remedies authorized by Rule 64 of the Federal Rules of Civil Procedure. Petitioners Power Engineering Company, Redoubt, Ltd. and Richard J. Lilienthal's compliance with the financial assurance requirements of 6 C.C.R. 1007-3, Part 266, in the specific context of this action has no purpose other than to provide prejudgment security guaranteeing Petitioners' compliance with a future District Court order. The labels applied to the mandatory relief granted by the District Court, and affirmed by the Court of Appeals, cannot and do not change its substance. The context of the District Court's mandatory injunctive order, the evidentiary basis for the District Court's finding of irreparable harm, the fact that compliance with the order does not bring Petitioners into compliance with the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et seq.* or the State of Colorado's implementing regulations, and the lack of any remedial purpose other than to secure future compliance with an Order of that District Court collectively demonstrate that the mandatory injunctive order is not "appropriate relief" under RCRA's enforcement provision, 42 U.S.C. §6928(a).

ARGUMENT

Petitioners contend that the District Court and the Court of Appeals erred as a matter of law by holding that Petitioners must obtain financial assurances pursuant to 6 C.C.R. 1007-3, Part 266 because such financial assurances constitute a prejudgment remedy within the specific context of this action. Federal Rule of Civil Procedure 64 provides the

exclusive pre-judgment remedies for securing satisfaction of a judgment or order to be entered in a case. The United States concedes this legal point in its response brief, arguing instead that the financial assurances ordered by the District Court are intended to guarantee payment of closure and post-closure costs, and not as pre-judgment security for pre-closure remediation costs.

The Court of Appeals erred by interpreting the financial assurances ordered by the District Court as applying to closure and post-closure costs, and not as an order for pre-judgment security for pre-closure remediation. Appendix "App." A, pp.19a-20a. The United States defends this interpretation by asserting that the District Court granted "appropriate relief" authorized by 42 U.S.C. §6928(a) because the mandatory injunction directs that Petitioners provide financial assurances for closure and post-closure costs necessary to close Petitioners' facility, and is not intended as a prejudgment remedy guaranteeing (through a third party financial institution) Petitioners' payment of costs for pre-closure remediation of contaminated soils and groundwater described in the United States complaint. The Court of Appeals' interpretation and the United States' premise fail because the District Court's order is directed solely to pre-closure remediation of existing contamination, and has no purpose other than to guarantee performance of a future District Court order directing such remediation.

There is no support for the Court of Appeals interpretation of the District Court's order as applying to closure and post-closure costs. The District Court's Order and the Court of Appeals' opinion are not based upon the premise that Petitioners will cease operations after remediation is completed. Closure and post-closure plans address the need to treat and/or dispose of expected

contamination at the time the facility ceases operations, and are dependent upon the nature of the facility, its operations, and the nature and extent of wastes present at the facility during its expected life. 6 C.C.R. 1007-3,§ §265.112, 265.118. The amount of financial assurances to be obtained by a RCRA facility is dependent upon an estimate of costs necessary to implement closure and post-closure plans for the facility. 6 C.C.R. 1007-3, §§266.12-266.14. The District Court's order could not have been based upon a cost estimate for the implementation of closure and post-closure plans because no such plans were offered into evidence. App. D, p. 96a. The $3.5 million in financial assurances ordered by the District Court was based *solely* upon the estimated cost of pre-closure remediation of contaminated soils and groundwater described in the complaint. App. D, pp. 95a-97a.

The Court of Appeals erred by equating the amount of financial assurances ordered by the District Court with closure and post-closure costs. The record is devoid of any evidence tending to establish that the amount of financial assurances was based *in any part* on an estimate of closure and post-closure costs contemplated by 6 C.C.R. 1007-3, §§266.12-266.14. It necessarily follows that the purpose of the District Court's Order was to provide the United States with a prejudgment remedy securing Petitioners' compliance with a future Order directing pre-closure remediation of contaminated soils and groundwater described in the complaint, and was not intended for the implementation of closure and post-closure plans meeting the requirements of 6 C.C.R. 1007-3, §§265.112 and 265.118.

The Court of Appeals failed to acknowledge the significance of the District Court's reliance on evidence of PEC's limited financial resources, failure to pay the civil

penalty assessed by the State of Colorado, allegations of a pattern of debt reduction and asset forfeiture, and statements regarding bankruptcy and abandonment of the facility.[1] App. A, p. 20a. Had the United States merely sought an order directing financial assurances for closure and post-closure costs, the evidence at the hearing would have consisted solely of closure and post-closure plans or their equivalent, and cost estimates for the implementation of those plans. No such evidence was offered. App. D, p. 96a. Evidence inferring the possibility that Petitioners would be financially unable to comply with a future District Court order directing remediation of the property is irrelevant to RCRA's regulatory requirement that a facility prepare and maintain closure and post-closure plans, and obtain financial assurances based upon the cost of implementing such plans. The United States and the District Court proceeded on the basis that injunctive relief was necessary due to the threat of irreparable harm created by Petitioners' perceived inability to satisfy a future order or judgment entered in the action, the very harm Federal Rule of Civil Procedure 64 is intended to remedy. The Court of Appeals erred by ignoring the significance of the District Court's reliance on such evidence.

The District Court's order serves no regulatory purpose other than as a means to guarantee (through a third party financial institution) payment of costs associated with

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[1] Petitioners have spent over $ 600,000 to remediate contamination since the District Court entered its mandatory injunction. Petitioners have fully characterized the existing contamination and have implemented soils and groundwater remediation measures. Petitioners have not filed bankruptcy, have not abandoned the business or the property, and have not taken flight. In short, the irreparable harm envisioned by the United States was a mirage.

pre-closure remediation of contaminated soils and groundwater. The United States' contention that the District Court's Order directing that Petitioners obtain financial assurances is "appropriate relief" for a violation of any RCRA requirement is without merit. The mandatory injunction is based upon findings that Petitioners illegally stored, treated and disposed of hazardous waste without a permit in violation of 42 U.S.C. §6925(a). App. D, pp. 85a-90a. The United States fails to explain how relief which will not bring Petitioners into compliance with 42 U.S.C. §6925(a) is "appropriate relief."

A court must tailor a remedy to fit the nature and extent of a statutory violation, and give only such relief as is authorized by the statue. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977). Plucking the financial assurance requirements out of the regulations governing closure of RCRA facilities, to the exclusion of all other applicable regulations, has no purpose other than as a prejudgment remedy. Had the United States truly sought Petitioners' compliance with regulations governing closure and post-closure of a RCRA facility, the United States would have requested and the District Court would have entered an injunction directing that Petitioners prepare and provide the closure and post-closure plans, closure and post-closure cost estimates, and obtain financial assurances based upon such plans and estimates. Instead, the United States sought and the District Court ordered financial assurances to cover estimated costs for pre-closure remediation activities. In short, the mandatory injunctive relief is not "appropriate relief" under 42 U.S.C §6928(a) because it does not remedy the nature and extent of the violation on which it is based, *i.e.,* the failure to comply with regulations governing closure and post-closure of a RCRA facility.

Viewed as a whole, the entire foundation of the District Court's order demonstrates that it is, in reality, a prejudgment security remedy that far exceeds the scope of any such remedy available under Federal Rule of Civil Procedure 64. The mandatory injunction does not remedy Petitioners' operation of a RCRA facility without a permit, does not remedy Petitioners' lack of closure and post-closure plans, cost estimates and financial assurances for implementation of such plans, and is premised upon the District Court's belief that Petitioners will not be able to financially comply with a future order directing pre-closure remediation of the property. The mandatory relief ordered by the District Court and affirmed by the Court of Appeals has every hallmark of a prejudgment security remedy, and none of the hallmarks of a RCRA enforcement remedy directing that Petitioners come into compliance with the Colorado hazardous waste regulations applicable to them. The labels applied by the United States, by the District Court, and by the Court of Appeals, do not and cannot change the substance of the District Court's order.

CONCLUSION

The petition for writ of certiorari should be granted. Supreme Court guidance is necessary to prevent the imposition of financial assurances as a prejudgment remedy to secure satisfaction of a future judgment in excess of the standards applicable to prejudgment remedies governed by Federal Rule of Civil Procedure 64.